STATE OF NEW YORK

6071

2019-2020 Regular Sessions

IN SENATE

May 16, 2019

Introduced by Sen. PARKER -- read twice and ordered printed, and when printed to be committed to the Committee on Local Government

AN ACT to amend the general municipal law, in relation to small wireless facilities development

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The general municipal law is amended by adding a new article 13-E to read as follows:

ARTICLE 13-E
SMALL WIRELESS FACILITIES DEPLOYMENT

Section 300. Definitions.
301. Use of right of way.
302. Collocation of small wireless facilities and micro wireless facilities.
303. Access to municipal corporation structures.
304. Local authority
305. Dispute resolution.
306. Indemnification.

§ 300. Definitions. For the purposes of this article, the following terms shall have the following meanings unless the context indicates otherwise:

1. "Antenna" means communications equipment that transmits or receives electromagnetic radio frequency signals used in the provision of wireless services.

2. "Applicable codes" means the New York State uniform fire prevention and building code as adopted, and as may be amended, pursuant to article eighteen of the executive law.

3. "Applicant" means any person or entity that files an application with a municipal corporation to install or modify wireless facilities on behalf of a communications service provider or wireless provider.

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

LBD11422-01-9

4. "Application" means a request submitted by an applicant to a local government for a permit to collocate small wireless facilities; or to approve the installation or modification of a utility pole or wireless support structure.

5. "Application fee" means the one time fee charged to an applicant by a municipal corporation for review of an application. The application fee may not exceed the actual reasonable costs incurred by the municipal corporation in connection with its review of the application.

6. "Pole" means: (i) a utility pole, other than a utility pole for designated services, owned or operated by a municipal corporation in the right of way, including a utility pole that provides lighting or traffic control functions, including light poles, traffic signals, and structures for signage; and (ii) a pole or similar structure owned or operated by a municipal corporation in the right of way that supports only wireless facilities.

7. "Base station" means wireless facilities or a wireless support structure or utility pole that currently supports wireless facilities. The term does not include a tower, as defined in 47 C.F.R. § 1.40001(b)(9), or associated wireless facilities.

8. "Collocate" means to install, mount, maintain, modify, operate, or replace wireless facilities on or adjacent to a wireless support structure or utility pole. The term "collocation" has a corresponding meaning.

9. "Communications service provider" means a cable operator, as defined in 47 U.S.C. § 522(5); a provider of information service, as defined in 47 U.S.C. § 153(24); a telecommunications carrier, as defined in 47 U.S.C. § 153(51); or a wireless provider.

10. "FCC" means the Federal Communications Commission of the United States.

11. "Fee" means a one-time charge.

12. "Law" means federal, state, or local law, statute, common law, code, rule, regulation, order, or ordinance.

13. "Micro wireless facility" means a wireless facility that meets the following qualifications: (i) is not larger in dimension than twenty-four inches in length, fifteen inches in width, and twelve inches in height; and (ii) any exterior antenna is no longer than eleven inches.

14. "Permit" means a written authorization required by a municipal corporation to perform an action or initiate, continue, or complete a project relating to the installation or modification of wireless facilities.

15. "Person" means an individual, corporation, limited liability company, partnership, association, trust, or other entity or organization.

16. "Rate" means a recurring charge.

17. "Right of way" or "ROW" means the area on, below, or above a public roadway, highway, street, sidewalk, alley, utility easement, or similar property, but not including a federal interstate highway.

18. "Small wireless facility" means a wireless facility that meets both of the following qualifications: (i) each antenna is located inside an enclosure of no more than six cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements could fit within an imaginary enclosure of no more than six cubic feet; and (ii) all other wireless equipment associated with the facility is cumulatively no more than twenty-eight cubic feet in volume. The following types of associated ancillary equipment are not included in the calculation of equipment volume: electric meter, concealment

elements, telecommunications demarcation box, ground-based enclosures, grounding equipment, power transfer switch, cut-off switch, and vertical cable runs for the connection of power and other services.

19. "Substantial modification" means a proposed modification to an existing wireless support structure or base station which will substantially change the physical dimensions of the wireless support structure or base station under the objective standard for substantial change adopted by the Federal Communications Commission pursuant to 47 C.F.R. § 1.40001.

20. "Utility pole" means a pole or similar structure that is used in whole or in part by a communications service provider or for electric distribution, lighting, traffic control, signage, or a similar function. Such term shall not include structures supporting only wireless facilities.

21. "Utility pole for designated services" means a utility pole owned or operated in the ROW by a municipal corporation, a public utility district, an electric membership corporation, or a rural electric cooperative that is designed to, or used in whole or in part for the purpose of carrying electric distribution lines or cables or wires for telecommunications, cable, or electric service.

22. "Wireless facility" means equipment at a fixed location that enables wireless communications between user equipment and a communications network, including: (i) equipment associated with wireless communications; and (ii) radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration. The term includes small wireless facilities and micro wireless facilities. The term does not include the structure or improvements on, under, or within which the equipment is collocated. The term does not include: (i) the structure or improvements on, under, or within which the equipment is collocated; or (ii) coaxial or fiber-optic cable that is between wireless structures or utility poles or that is otherwise not immediately adjacent to or directly associated with a particular antenna.

23. "Wireless infrastructure provider" means any person, including a person authorized to provide telecommunications service in the state, that builds or installs wireless communication transmission equipment, wireless facilities or wireless support structures, but that is not a wireless services provider.

24. "Wireless provider" means a wireless infrastructure provider or a wireless services provider.

25. "Wireless services" means any services, whether at a fixed location or mobile, provided using wireless facilities.

26. "Wireless services provider" means any person or entity that provides wireless services.

27. "Wireless support structure" means a freestanding structure, such as a monopole; tower, either guyed or self-supporting; billboard; or, other existing or proposed structure designed to support or capable of supporting wireless facilities. Such term shall not include a utility pole.

§ 301. Use of right of way. 1. Applicability. This section shall only apply to the activities of a wireless provider within the right of way.

2. Exclusive use prohibited. A municipal corporation may not enter into an exclusive arrangement with any person for use of the right of way for the construction, operation, marketing, or maintenance of wireless facilities or wireless support structures or the collocation of small wireless facilities or micro wireless facilities.

3. Right of way rates and fees. A municipal corporation may only charge a wireless provider a rate or fee for the use of the right of way with respect to the construction, installation, mounting, maintenance, modification, operation, or replacement of a wireless facility or wireless support structure in the right of way, including collocation in such right of way, if the municipal corporation charges other communications service providers or publicly, cooperatively, or municipally owned utilities for the use of the right of way. If a municipal corporation is authorized by applicable law to charge a rate or fee to those persons or entities, and does so, any such rate or fee for a wireless provider must be: (i) limited to no more than the direct and actual cost of managing the right of way; and (ii) competitively neutral with regard to other users of the right of way, including investor, municipal corporation, or cooperatively owned entities. No rate or fee may: (i) result in a double recovery where existing rates, fees, or taxes already recover the direct and actual costs of managing the rights of way; (ii) be in the form of a franchise or other fee based on revenue or customer counts; (iii) be unreasonable or discriminatory; (iv) violate any applicable law; or (v) exceed an annual amount equal to twenty dollars times the number of utility poles or wireless support structures in the municipal corporation's geographic jurisdiction on which the wireless provider has collocated a small wireless facility antenna. Notwithstanding the foregoing, in recognition of the public benefits of the deployment of wireless services, a municipal corporation is permitted, on a nondiscriminatory basis, to refrain from charging any rate or fee to a wireless provider for the use of the right of way.

4. Rate or fee adjustment. Should a municipal corporation have an existing rate or fee to construct, install, mount, maintain, modify, operate, or replace a wireless facility or wireless support structure in the ROW, including collocation in such ROW, controlled by the municipal corporation and such rate or fee does not comply with the requirements in subdivision three of this section, not later than six months following the effective date of this article, the municipal corporation shall implement a revised rate or fee to ensure compliance with such subdivision three for all affected persons.

5. Right of access. Subject to the provisions of this section and approval of an application, if required, a wireless provider shall have the right, as a permitted use not subject to zoning review or approval, but subject to the issuance of a permit by the municipal corporation as provided in this article, to collocate wireless facilities and construct, modify, maintain, and operate utility poles, wireless support structures, conduit, cable, and related appurtenances and facilities along, across, upon, and under the ROW. Such structures and facilities shall be so constructed and maintained as not to obstruct or hinder the usual travel or public safety on such ROW or obstruct the legal use of such ROW by other utilities. Each new or modified utility pole and wireless support structure installed in the ROW shall not exceed the greater of (i) ten feet in height above the tallest existing utility pole in place as of the effective date of this article located within five hundred feet of the new pole in the same ROW; or (ii) fifty feet above ground level. New wireless facilities in the ROW may not extend (i) more than ten feet above an existing utility pole or wireless support structure in place as of the effective date of this article; or (ii) above the height permitted for a new utility pole or wireless support structure under this section. Notwithstanding the foregoing:

a. Subject to this article, a wireless provider shall have the right to construct, modify and maintain a utility pole, wireless support structure, or wireless facility that exceeds these size limits along, across, upon and under the ROW, subject to review in accordance with applicable municipal zoning regulations; and

b. Applicants shall comply with nondiscriminatory undergrounding requirements after obtaining prior zoning approval in areas zoned for single family residential use, provided that such requirements shall not prohibit the replacement of existing structures or result in an effective prohibition of services. In all other zoning districts, prior zoning approval shall not be required for undergrounding new infrastructure associated with small wireless facilities.

6. No discrimination. The municipal corporation, in the exercise of its administration and regulation related to the management of the ROW must be competitively neutral with regard to other users of the ROW, including that terms may not be unreasonable or discriminatory and may not violate any applicable law.

7. Damage and repair. The municipal corporation may require a wireless provider to repair all damage to the ROW directly caused by the activities of the wireless provider, while occupying, installing, repairing or maintaining wireless facilities, wireless support structures, or utility poles in the ROW and to return the ROW to its functional equivalence before the damage pursuant to the competitively neutral, reasonable requirements and specifications of the municipal corporation. If the wireless provider fails to make the repairs reasonably required by the municipal corporation within a reasonable time after written notice, the municipal corporation may effect those repairs and charge the applicable party the reasonable, documented actual cost of such repairs.

§ 302. Collocation of small wireless facilities and micro wireless facilities. 1. Applicability. The provisions of this section shall apply to activities of a wireless provider within or outside of the right of way.

2. Except as expressly provided in this article, no municipal corporation may regulate, prohibit or charge for the collocation of small/micro wireless facilities.

3. Small wireless facilities and micro wireless facilities shall be classified as permitted uses and not subject to zoning review or approval if they are collocated: (i) in the right of way in any zoning district; or (ii) outside the right of way in property not zoned exclusively for single family residential use.

4. A municipal corporation may require an applicant to obtain one or more permits to collocate a small wireless facility, provided such permits are of general applicability and do not apply exclusively to wireless facilities. A municipal corporation shall receive applications for, process, and issue such permits subject to the following requirements: (i) no municipal corporation may, directly or indirectly, require an applicant to perform services unrelated to the collocation for which approval is sought, such as in-kind contributions to the municipal corporation, including reserving fiber, conduit, or pole space for the municipal corporation; (ii) no applicant shall be required to provide more information to obtain a permit than communications service providers that are not wireless providers; (iii) within ten days of receiving an application, a municipal corporation shall determine and notify the applicant whether the application is complete. If an application is incomplete, the municipal corporation shall specifically identify what information is missing; (iv) an application shall be processed on a

nondiscriminatory basis and shall be deemed approved if the municipal corporation fails to otherwise approve or deny the application within sixty days of receipt; and (v) a municipal corporation shall approve an application unless it does not meet the requirements of this article. The municipal corporation shall document the basis for any denial, including the specific code provisions on which the denial was based, and send the documentation to the applicant on or before the day the municipal corporation denies the application. The applicant may cure the deficiencies identified by the municipal corporation and resubmit the application within thirty days of the denial without paying an additional application fee. The municipal corporation shall approve or deny the revised application within thirty days. Any subsequent review shall be limited to the deficiencies cited in the denial; (vi) an applicant seeking to collocate small wireless facilities within the jurisdiction of a single municipal corporation shall be allowed, at the applicant's discretion, to file a consolidated application and receive a single permit for the collocation of multiple small wireless facilities; (vii) collocation for which a permit has been granted shall commence within one year of approval and shall be pursued to completion; and (viii) no municipal corporation may institute, either expressly or de facto, a moratorium on: a. filing, receiving, or processing applications; or b. issuing permits or other approvals, if any, for the collocation of small wireless facilities.

5. Application fees shall be subject to the following requirements: (i) a municipal corporation may charge an application fee only if such fee is required for similar types of commercial development within the municipal corporation's jurisdiction; (ii) a municipal corporation shall only charge a fee for the actual, direct, and reasonable costs incurred by the municipal corporation relating to the granting or processing of an application. Such fees shall be reasonably related in time to the incurring of such costs. Where such costs are already recovered by existing fees, rates, or taxes paid by a wireless provider, no application fee shall be assessed to recover such costs; (iii) a fee may not include: a. travel expenses incurred by a third party in its review of an application; or b. direct payment or reimbursement of third party rates or fees charged on a contingency basis or a result-based arrangement; (iv) in any controversy concerning the appropriateness of a fee, the municipal corporation shall have the burden of proving that the fee is reasonably related to the actual, direct, and reasonable costs incurred by the municipal corporation; (v) total application fees, where permitted, shall not exceed the lesser of the amount charged by the municipal corporation for: a. a building permit for any similar commercial construction, activity, or land use development; or b. one hundred dollars each for up to five small wireless facilities addressed in an application and fifty dollars for each additional small wireless facility addressed in the application.

6. No municipal corporation shall require an application for: (i) routine maintenance; (ii) the replacement of wireless facilities with wireless facilities that are substantially similar or the same size or smaller; or (iii) the installation, placement, maintenance, operation or replacement of micro wireless facilities that are strung on cables between existing utility poles, in compliance with the national electrical safety code. A municipal corporation may require a permit to work within the right of way for such activities, if applicable. Any such permits shall be subject to the requirements of this section.

§ 303. Access to municipal corporation structures. 1. Collocation of small wireless facilities on or adjacent to municipal corporation poles and utility poles for designated services. (i) Exclusive arrangements prohibited. A person owning or controlling municipal poles or utility poles for designated services may not enter into an exclusive arrangement with any person for the right to attach to or adjacent to such poles.

(ii) Rates. a. The rates and fees for collocations on or adjacent to municipal corporation poles or utility poles for designated services shall be nondiscriminatory regardless of the services provided by the collocating person; b. the rate to collocate on or adjacent to utility poles for designated services may not exceed the annual recurring rate that would be permitted under rules adopted by the FCC under 47 U.S.C. § 224(e) if the rates were regulated by the FCC or twenty dollars per year per wooden utility pole or two hundred dollars per year per metal, concrete, or fiberglass utility pole, whichever is less; c. the rate to collocate on municipal corporation poles shall recover the actual, direct, and reasonable costs related to the applicant's application for and use of space on the municipal corporation pole; d. the total annual rate for collocations and any activities related to such collocations shall not exceed the lesser of actual, direct, and reasonable costs related to the collocation on or adjacent to the pole or twenty dollars per year per wooden utility pole or two hundred dollars per year per metal, concrete, or fiberglass utility pole, whichever is less; e. in any controversy concerning the appropriateness of a rate for a municipal corporation's pole, the municipal corporation shall have the burden of proving that the rates are reasonably related to the actual, direct, and reasonable costs incurred for use of space on the pole for such period; f. should a municipal corporation, municipally-owned or operated-person, public utility district, or cooperative have an existing pole attachment rate, fee, or other term that does not comply with the requirements of this section, the municipal corporation, municipally-owned or operated person, public utility district, or cooperative shall, not later than six months following the effective date of this article, reform such rate, fee, or term in compliance with this subdivision.

(iii) Rates, fees, and terms to be offered. Persons owning or controlling municipal corporation poles and utility poles for designated services shall offer rates, fees, and other terms that comply with the provision set forth in this section within the later of six months of the effective date of this article or three months after receiving a request to collocate its first small wireless facility on a municipal corporation pole or a utility pole for designated services owned or controlled by a municipal corporation.

2. Collocation on or adjacent to municipal corporation wireless support structures and utility poles outside the right of way. A municipal corporation shall authorize the collocation of small wireless facilities and micro wireless facilities on or adjacent to wireless support structures and utility poles owned or controlled by a municipal corporation that are not located within the right of way to the same extent the municipal corporation permits access to such structures for other commercial projects or uses. Such collocations shall be subject to reasonable and nondiscriminatory rates, fees, and terms as provided in an agreement between the municipal corporation and the wireless provider.

§ 304. Local authority. Subject to the provisions of this article and applicable federal law, a municipal corporation may continue to exercise

zoning, land use, planning and permitting authority within its territorial boundaries, including with respect to wireless support structure and utility poles; except that no municipal corporation shall have or exercise any jurisdiction or authority over the design, engineering, construction, installation, or operation of any small wireless facility or micro wireless facility located in an interior structure or upon the site of any campus, stadium, or athletic facility not otherwise owned or controlled by the municipal corporation, other than to comply with applicable codes. Nothing in this article authorizes the state or any political subdivision, including a municipal corporation, to require wireless facility deployment or to regulate wireless services.

§ 305. Dispute resolution. Courts of competent jurisdiction shall have jurisdiction to determine all disputes arising under this article.

§ 306. Indemnification. No municipal corporation shall require a wireless provider to indemnify and hold the municipal corporation and its officers and employees harmless against any claims, lawsuits, judgments, costs, liens, losses, expenses or fees, except when a court of competent jurisdiction has found that the negligence of the wireless provider while installing, repairing or maintaining caused the harm that created such claims, lawsuits, judgments, costs, liens, losses, expenses, or fees or to require a wireless provider to obtain insurance naming the municipal corporation or its officers and employees an additional insured against any of the foregoing.

§ 2. This act shall take effect on the thirtieth day after it shall have become a law.