

PROTEC
Comparison and Comment on SB 637/894; 2018 PA 365/366 and FCC
Moratoria Order of 8/3/2018 and Small Cell Order of 9/27/2018 and
Cable NPRM of 9/25/2018

January 9, 2019 Working Draft
Updated 1/29/2019; 2/3/2019; 2/17/19; 5/14/2019

SB 637/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 a 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 -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>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 preem if they are (1) reasonable, (2) no more burdensome t 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</p>	<ul style="list-style-type: none"> • Small cell wireless Application: <ul style="list-style-type: none"> - Colocation: 60 days - New structure: 90 days

apply outside the ROW

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 or \$300** if **new or replacement** 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

- **Non-Small Cell Application:**

- colocation: **90 days**

- New Structure: **150 days**

- **Incomplete** = Tolling: Renews back to -0- only 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 costs

- **Application Suggested Fees:**

- **Colocation: \$500** for up to 5 apps + **\$100** for additional App

- **New: \$1000**

- **Annual: \$270**

- Fees higher than the those set a 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 a

	<p>objectively reasonable, and</p> <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> <ol style="list-style-type: none"> 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: <ol style="list-style-type: none"> (a) Modification of existing or installation of new wireless? facilities (b) Modification of existing or installation of new wireless support structures 2. Zoning approval Process: <ol style="list-style-type: none"> (a-b) 30 days to raise Incomplete App with detailed reasons – 10 days to raise Incomplete on subsequent submission. Clock not restarted. (d) Colocation Approval or Denial: 90 days New Site Approval or Denial: 150 days Failure to meet timeline = Deemed Approved – provider to give 15 day notice of intent to install (3) Basis for Denial: Reasonable, Nondiscriminatory. Provider plans presumed reasonable. Need and other 	<p>No Corollary other than Zoning not a defense to stated rules</p>

<p>business reasons not relevant. 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><u>90-day extension for compliance with Act (6/10/19)</u></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 colocated 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 <u>Anywhere – Not ROW limited</u></p> <p>N/A</p>	<p>N/A</p>
<p>Sec 23. Muni Owned Electrics <u>Anywhere – Not ROW limited</u></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 (4 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 9/27/18 ROW Order: https://docs.fcc.gov/public/attachments/FCC-18-

	133A1.pdf 9/25/18 Cable NPRM Proposed Order: https://ecfsapi.fcc.gov/file/0925046713889/FCC-18-131A1.pdf
tbd	tbd

ADDITIONAL NOTES

1. SB 894; 2018 PA 366

ZBA Amended:

“Sec. 205.

(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.

...

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

- I take PA 366; SB 894 to mean that the new Michigan Small Cell Act (PA 365; SB 637) applies to and overrides the ZEA with respect to Small Cells and, that the 2012 Am to the ZEA pertaining to Macro Towers does not apply to small cells, contrary to a position which some wireless industry members were taking at one time. –mjw 1/24/19

2. FCC intends to expand Small Cell ROW orders to Macro Cells on ALL Public Property.
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. Broad Indemnity (include RF issues)

e. Reservation of Rights

f. A requirement that the applicant provide you with the legal support for their application

g. 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.

- mjwt edited 1/29/2019

Q&A

Q: Does MDOT provide some cover for the City given that the main road is an MDOT Hwy?

A: Michigan PA 365, and the new FCC rules, include the state as an “authority” so MDOT would appear to be subject to the same rules. To the extent they develop rules that are more favorable to them and the City than perhaps other interpretations of the Act and FCC Rules, I think you might have some cover. Let me know what you find out about their rules as they develop.

State Law PA 365/SB 637: Sec 3“(f) “Authority”, unless the context implies otherwise, means this state, or a county, township, city, village, district, or subdivision thereof if authorized by law to make legislative, quasi-judicial, or administrative decisions concerning an application described in this act.”

State Law PA 366/SB 894: N/A

FCC Rules: As an example, in the Moratoria DEC Rule of August 2018, the FCC took a direct shot at the State law on seasonal road weight restrictions See 3rd Report and Order and Declaratory Ruling of August 3, 2018 FCC18-111 Sec 143

Q: What extra protection do the FCC and State laws provide for Historic Districts?

A: A reasonable standard applies in properly designated districts.

State Law PA 365/SB 637:
Sec 5

“(h)“Historic district” means a historic district established under section 3 of the local historic districts act, 1970 PA 169, MCL 399.203, or a group of buildings, properties, or sites that are either listed in the National Register of Historic Places or formally determined eligible for listing by the Keeper of the National Register, the individual who has been delegated the authority by the federal agency to list properties and determine their eligibility for the National Register, in accordance with Section VI.D.1.a.i-v of the Nationwide Programmatic Agreement codified at 47 CFR Part 1, appendix C.

Sec 3

“(8) Subject to section 15(2), and except for facilities excluded from evaluation for effects on historic properties under 47 CFR 1.1307(a)(4)(ii), an authority may adopt written, objective requirements for reasonable, technically feasible, nondiscriminatory, and technologically neutral design or concealment measures in a historic district, downtown district, or residential zoning district. Any such requirement shall not have the effect of prohibiting any wireless provider’s technology. Any such design or concealment measures are not considered a part of the small wireless facility for purposes of the size restrictions in the definition of small wireless facility in section 7.”

And, a Municipality can deny an application where it:

Sec 15(i)(ix) “Fail[s] to meet reasonable, objective, written stealth or concealment criteria for small cell wireless facilities applicable in a historic district or other designated area, as specified in an ordinance or otherwise and nondiscriminatorily applied to all other occupants of the ROW, including electric utilities, incumbent or competitive local exchange carriers, fiber providers, cable television operators, and the authority.”

State Law PA 366/SB 894: N/A

FCC Rules: “We conclude that 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.” This includes Historic Districts See FCC DECLARATORY RULING AND THIRD REPORT AND ORDER of 9/27/18; 18-133; sec 85 etal

Q: Does the Metro Act still govern fiber connections to Wireless facilities in the ROW?

A: **Yes...apparently.** The State Small Cell law says that a “Communications Facility” includes “wires and cables”. Does that mean connecting fiber from a macro tower a mile away? But Sec 11(2)(b) states that approval of a small cell app does not include wireline connections – which is the Metro Act. So my suggestion is that we continue to treat the fiber connections component of a wireless application as subject to the Metro Act and that application and permitting process.

State Law PA 365/SB 637: Sec 5(b) “Communications facility” means the set of equipment and network components, including wires, cables, antennas, and associated facilities, used by a communications service provider to provide communications service.” **Contrast Sec 11(2)(b)**

State Law PA 366/SB 894: N/A

FCC Rules: Not obviously applicable, though some sections may apply. Open to further review

Q: Are there any minimum qualifications for wireless installers in the ROW?

A: Nothing specific is spelled out in the Small Cell Act or FCC orders. So I think you should exercise your police powers and include some of the Metro Act type background questions into your application, which may be hinted at in Sec 23, requiring compliance with applicable engineering standards etc., including the right to require basic identification (Sec 35), bonding (Sec 33), and insurance and indemnification language (Sec 29)

State Law PA 365/SB 637: Only the right to require bonds, insurance and indemnity (See Sec’s 23, 29, 33 and 35)

State Law PA 366/SB 894: N/A

FCC Rules: Nothing clearly spelled out.

Re:

“This Declaratory Ruling interprets Section 253 and 332(c)(7) in the context of three categories of fees, one of which applies to all deployments of Small Wireless Facilities while the other two are specific to Small Wireless Facilities deployments inside the ROW. (1) “Event” or “one-time” fees are charges that providers pay on a non-recurring basis in connection with a one-time event, or series of events occurring within a finite period. The one-time fees addressed in this Declaratory Ruling are not specific to the ROW. For example, a provider may be required to pay fees during the application process to cover the costs related to processing an application building or construction permits, street closures, or a permitting fee, whether or not the deployment is in the ROW.

- Dec Ruling and 3rd Report and Order of 9/27/18 @ Fn 71

- mjw edits 2/3/2019

\$300 not \$200 for REPLACEMENT Poles:

Sec 15(3)

(a) \$200 for ea. Small cell **alone**.

Or

(b) \$300 for ea small cell **and new** utility pole.

And, Sec 5(a): colocations re the small cell wireless facility do not include installations of new poles or other “make ready work”.

And, Sec 7(b): “make ready” work includes replacement of utility poles.

mjw 5/14/2019



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