

PROTEC Municipal Memo Re Michigan SB 637

There are many specific concerns with the Bill which are discussed below.

But first we would like to state affirmatively some of the positives that exist regarding this subject matter and on which I believe local communities, the wireless industry and perhaps you and your committee members can agree.

1. We agree there is a need for greater communications connectivity in our community and across America. While wireless is only a small part of the answer, ubiquitous fiber deployment being the ultimate solution, deployment of targeted wireless equipment necessary to enhance wireless connectivity is critical to local and global communication and economic development.
2. As home and business owners, we all agree we must integrate wireless equipment into our communities in a fashion that allows this technology to be shared by all residents and, by a method that does not change the essential character and value of our hometown communities.
3. The wireless industry and local communities have managed to develop reasonable methods of implementing wireless equipment into our communities at the Macro Tower level for decades. The process is not always as quick as all of us would like, but important issues in a Democratic process require deliberation by all stakeholders including 1st and foremost, the residents and local businesses directly affected by such changes. That process necessarily takes time, each unique community by community.
4. Support of local zoning rules and Right of Way (ROW) management is critical, as every resident, including you and I, rely upon them to maintain the essential character of our particular home town and each of our own homes where we raise our families.
5. With respect to the very recent proliferation of Distributed Antenna Systems (DAS) and Small Cells, local communities and the wireless industry have achieved some level of success already and, without new state or federal legislation. If this legislation is passed, an interruption of this collaborative process will occur.
6. Specifically, I note that on the subject of safety, due to commentary and studies performed by local government, including Bloomfield Township and a number of other local governments, the industry has changed its installation paradigm dramatically. Local communities are no longer seeing hundreds of requests for 120' steel macro towers mere inches from the travelled portion of the ROW or road surface. We also most recently see a dwindling number of requests for new poles of any kind in the ROW, the industry having apparently acknowledged the profound safety risk every new structure in the ROW poses to the motoring public. But this is a relatively new

development, occurring just in the last 6 months or so. These successes as between locals and industry could easily be swept away by ill-advised legislation, to the detriment of all Michiganders.



ACD.Net DAS Pole in Genesee Co ROW struck by a passenger vehicle; Related – See a Rd Comm Video explaining many of the safety issues with objects located in the ROW:
vimeo.com/247183922

7. So I would argue that the local process works and I suggest strongly that hurrying the process will do substantial harm to Michigan communities at great cost to all our constituents.

Now I need to turn to specific concerns with the Bill and review some of the history of this subject which has been grossly mischaracterized by the industry.

- a. **Money:** Money is indeed a significant reason why we are all sitting here today and looking at this investor owned wireless industry promoted Bill. But that money conversation and this entire subject matter started with the industry:

“The nation’s fourth-largest carrier has talked publicly about shaving \$2 billion in overhead....Sources familiar with the initiative said Sprint plans to cut its network costs by relocating its radio equipment from tower space it has leased from Crown Castle and American Tower to spots on government-owned properties, which costs much less. This process could begin as soon as June or July.” –

Recode BY [DAWN CHMIELEWSKI](#) AND [INA FRIED](#) JAN 15, 2016, 9:44AM

<https://www.recode.net/2016/1/15/11588832/sprint-finalizes-plan-to-trim-network-costs-by-up-to-1-billion>

“We continue to be focused on maximizing network performance as well as efficiency of capital and operating cost with the cost to build and operate these densification sites being materially less than our macro site builds in the past.” -

SEC Transcript p.5 and slide 9 12/31/15 by Sprint R. Marcelo Claure President, Chief Executive Officer & Director

http://s21.g4cdn.com/487940486/files/doc_financials/transcripts/c-transcript-12-31-15.pdf

Finally, It has been suggested that local communities are “just in it for the money”. In fact, the costs communities seek to recover as well as very nominal rental charges imposed for industry use of otherwise taxpayer supported Rights of Way, are hardly in a league with industry charges for resulting services to their millions of customers. See further discussion below at item **g**.

b. Delay: There are allegations that the industry cannot be made to wait in deploying 5 G services. But these services have not even been developed yet.

And, notwithstanding the industry assertions of needless delay at the local level, if there has been delay, the reasons rest at the feet of the industry on at least two levels:

1. The industry has steadfastly refused to acknowledge Constitutionally mandated local government control of and right to franchise ROW access.

“No person, partnership, association or corporation, public or private ... shall have the right to ... transact local business therein without first obtaining a franchise from the township, city or village. Art 7 Sec 29 Const of 1963”

See also sec 31 which provides that “The legislature shall not vacate or alter any road, street, alley or public place under the jurisdiction of any county, township, city or village.” And Sec 34 providing for liberal construction of these provisions in favor of local government.

2. “Delay” also frequently results from the industry seeking site approval with obvious placement problems – including by example, proposed placement of large towers in front of historical buildings, within inches of heavily travelled roadways, or placement of facilities where they would interfere with ADA access to sidewalks.

We seek a reasonable amount of time to ensure that communities, especially the neighbors that are proximate to the deployment have the opportunity to be heard, and so that public safety issues might be addressed.

See also our discussion above regarding the nature of many of the original applications seeking new poles and some including 120’ towers adjacent to the road surface.

- c. The Bill risks More Bureaucracy because the Feds are already acting** on DAS/Small Cell issues across the board and so, there is no need to rush through a seriously flawed State bill. There are detailed and thoughtful ongoing federal proceedings at the FCC and in Congress on some of these same issues. Creating additional state level regulatory layers (**more bureaucracy**) is not necessary or helpful to streamlining deployment. At a minimum this legislature should take up wireless issues only **after** federal action is completed. Anything this Legislature does now will be preempted either in whole or in part by the Federal proceedings. Surely we all have better things to do at present.
- d. Private Property Owner Rights:** Because the placement of this obviously above ground equipment in the size and fashion contemplated in the Bill will surely impact private property owner values, inverse condemnation claims against the State and locals are likely to proliferate. Locals will be seeking indemnity from the State and the industry should these suits occur on the heels of this legislation. It is certainly appropriate to require the very companies who wish to move to the rights of way to save costs, to compensate the homeowners they harm – particularly - since the adjacent homeowner may not need, and may not be able to use the antenna placed in front of their home.
- e. Size Matters - Small refers to the area served, not the size of the equipment deployed:** DAS/"Small" Cell terminology clearly does not refer to the size of the wireless equipment that industry intends to deploy, though it should. Instead, This Bill authorizes **28 cu ft** and an additional **6 cu ft** of equipment on existing or replacement structures. See photo below of a **34cu ft** commercial size refrigerator. At the sole Senate Committee hearing to date, Senator Hune displayed a **1 cu ft** device he stated was the size of the "small cell" equipment intended. Why then the request for a combined **34 cu ft** for that equipment? See contrasting photos below of Senator Hune's device and then, a 34 cu ft commercial refrigerator. Note too, that pursuant to arguments over current FCC collocation regulations that the industry will make, if this Bill passes as written, we can expect to see potentially 4 (one for each national wireless carrier) of these refrigerators on 6 foot extensions on top of poles in front of our homes and neighborhoods and, at least every 500 feet to accommodate each of the 4 national carriers.

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Sen. Joe Hune
(R) 22nd District - Hamburg

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34.3 Cu ft Samsung Chef Collection https://www.bestbuy.com/site/samsung-chef-collection-34-3-cu-ft-4-door-flex-french-door-refrigerator-with-thru-the-door-ice-and-water-stainless-steel/6665107.p?skuld=6665107&ref=212&loc=1&ksid=a2baab3f-70f8-4a84-b7c7-7ac23c08c568&ksprof_id=13&ksaffcode=pg214272&ksdevice=c&lsft=ref:212,loc:2



Portland, Oregon

- f. **Height:** “...the greater of 10 feet...above the tallest existing pole...or 50 feet...”. (Sec 5(5)(a)) This Bill language means that current 30-35’ electric poles in our neighborhoods just grew at least 15 to 20 feet and, in some places 25-30 feet or more. And, it may be that with this legislation, the industry will be emboldened to resume past practices such as Mobilitie’s 120 towers along road edges.



Mobilitie 120' Tower in Flint, MI

- g. Fees and Rates:** The industry certainly recovers all its costs, plus a profit from all of us as customers. Local communities, on behalf of their taxpayer residents and businesses are as much entitled to recover at least the full cost of the entire DAS/Small Cell Application, review and permitting/franchising process. Furthermore, the ROW are supported by taxpayers who pay property taxes based in part, on market rates. Market rates must be utilized to set ROW rates in order to incent the industry to make their

intrusions as few and small as possible and, to avoid disincentivizing the industry from deploying on private property owner lands, which had been the industry business model until its recent decision to saddle local communities with those burdens. When a private enterprise employs public assets for commercial purposes, that use should be compensated at market rates, otherwise the owners of those assets are not properly compensated and economic theory teaches that unwise uses of public assets result. This is particularly so where the public assets are simply to be used as a free substitute for readily available private property. And, Federal Highway Funding Regulations require public ROW property funded with federal dollars, be conveyed away only at market rates. Last, to do otherwise, amounts to local government subsidizing private for profit entities, which is barred by the State Constitution. See Art 7 Sec 26

- h. Empty Promises:** As drafted, SB 637 makes not one enforceable promise that the money saved by the industry as a result of this give-away of public assets will actually be used to benefit our residents including, deployment of wireless in unserved or underserved rural areas in Michigan or anywhere else. We also know from past experience that the promises of broad ubiquitous infrastructure investment and lower rates as a result of similar deregulation laws are empty. Did the 2002 Metro Act result in broad Michigan wide deployment of fiber lines to all residents at lower rates? Has your cable bill gone down since 2006 PA 480, the Michigan Uniform Video Service local Franchise Act?

The legislature must be guided by the old adage, fool me once, shame on you, fool me twice, shame on me. If this legislation is to pass muster, let us include and impose detailed recitations of industry commitments including caps on provider fees to subscribers, detailed descriptions on how much investment by what dates, how much infrastructure yielding how much bandwidth to all Michigan residents and businesses by specific dates, a ban on redlining along socio-economic borders, etc.

- i. The Bill Fails Procedurally:** The Bill is obviously a very early draft which is in need of much organizational work at a minimum, which if left uncorrected, makes it subject to collateral attack, as occurred in Ohio when over 100 municipalities had a similar bill overturned by the Courts. On this note, the Bill appears to reach beyond the ROW into other public as well as private property, again, both a potentially fatal procedural defect and a reach into the pockets of private property owners.
- j. Timing of Review and Approvals:** Blanket time periods of mere weeks are unworkable. The reviews and negotiations where necessary for these large above ground structures (unlike many of the underground "lines" governed by the Metro Act) present substantial issues for local government, residents and businesses, to develop coherent and consistent plans, which must be adapted to fit each unique community by community. These shorter time limits of mere weeks, are patently unworkable and will act as a taking of Constitutional authority at a minimum. By contrast, existing federal guidelines create a process from start to finish for approval of new applications in 150

days, with options to expand the time frame under certain circumstances and/or unless the parties choose to proceed on a different schedule.

- k. **Cable enjoys a Pass?** The Micro facilities (WiFi) intended by Cable, which we believe are already deploying without permission in countless towns around Michigan and the Country, appear to be exempt under the Bill at present. This sets up a potential discrimination claim by the other wireless providers and is obviously contrary to law and good policy. (Though there is some interest in exploring discussion of a broader use of this cable technology given its truly small size.)
- l. **Unconstitutional Delegation:** A Provision in the Bill that the provider's application is presumed reasonable and no showing of need for this uncompensated public ROW intrusion is necessary, results in an unconstitutional delegation of Local Constitutional authority. Do the supporters of this Bill seriously intend to turn over local zoning and their own front yards to every entity wishing to do business in their own home town? Similar concerns arise with the Bill's mandate of retroactive adoption of such standards.
- m. A detailed analysis and 4 expert reports in support of these and additional concerns can be found in our Smart Communities filing at the FCC website here:
https://ecfsapi.fcc.gov/file/1030998488645/COMMENTS_SMART%20COMMUNITIES%20SITING%20COALITION.pdf

In short Mr. Chairman, SB 637 will turn over ownership, regulation and management of our citizen's supported public lands to the wireless industry for its use in profiteering from those same citizens with no clear assurance of a single benefit to our constituents. This is so because despite the bluster, nothing promised by the industry is being offered for free. The industry is not running a charity. Their promised benefits to Michigan and its residents will only be extended to our residents for what? ... **a market based fee**. We ask for the same market conditions to govern our fees supporting our taxpayer resident's ROW.



Arizona Wireless Facility in the ROW. Annual Fee: \$20,000 – Pre Arizona passing its version of SB 637. Fees next year? Likely less than 10% of the agreed fees due to Az's version of SB 637.

Denying local communities the right to manage and recover all costs and market rates for access to our taxpayer supported ROW amounts to yet another new tax on local residents and businesses.

For these reasons and more, we implore you to abandon this unneeded legislation, as it serves at best, as a distraction from the important work many of us are doing today to bring locals and industry together for the benefit of all.

Should this effort instead move forward, at the very least, a work group of knowledgeable experts representing all stakeholders should be convened so that at a minimum, we all understand the facts vs fiction.

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