LEGISLATIVE VIEWPOINT

NJLM New Jersey State League of Municipalities

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November 13, 2019

Hon. Carol Murphy
Assemblywoman, District 7
504 Route 130 North, Suite 100
Cinnaminson, NJ 08077

Re: A-5560, Small Cell Wireless

Dear Assemblywoman Murphy,

It is our understanding that on Thursday, November 14 there will be a discussion only hearing on your bill, A-5560. We anticipate presenting a written statement and to testify to highlight the concerns of municipal governments with the proposal. Thus, we write to you in advance of that hearing and on behalf of New Jersey's 565 municipalities to voice our opposition to A-5560 as introduced, which intends to provide a uniform regulation of small wireless facility deployment within the State.

We deeply appreciate that the hearing on the 14th is for discussion only, so that we can continue these dialogues in a thoughtful manner. In that spirit, this letter is intended to be as detailed as we can at the moment, highlighting several provisions which we believe are objectionable. Thus, what follows are some general comments from the municipal perspective and then some very specific, section by section, comments which highlight our major concerns, objections and pose some questions where we believe the bill language is unclear. While this listing is intended to be thorough, it is not necessarily exhaustive and we may make further comments based on our continued analysis of the bill and discussions with other stakeholders and sponsors.

From the outset, however, we want to express that municipal leaders share in the goal of broad deployment of 5G and small cell wireless technology. This type of technology is a crucial foundation for smart-city initiatives, connected cars, and other elements of the, "internet-of-things." More importantly, 5G/small cell technology can help bridge the digital divide that persists throughout our state and the country – with the possibility of expanding access to reliable high-speed internet to those traditionally underserved.

It is understood that the quickest and cheapest way for the telecommunications industry to deploy this technology is through access to the public rights-of-way. And, while the societal benefit that this technology is sure to bring certainly justifies access to the right-of-way we cannot and should not forget that this is a limited public asset that must be carefully managed and preserved.

It should also be understood that municipal governments actively manage public rights of way to protect residents' safety, preserve the character of their community, and maintain the availability of the public rights of way for current and future uses. Municipal governments act as the trustee for this limited pubic asset and should not have their ability to it diluted for the benefit of private shareholders.

While we share the objective of finding ways to effectively deploy broadband technologies, especially in underserved communities, we are concerned that A-5560, as introduced, would significantly impede municipalities' ability to serve as trustees of public property, safety, and welfare.

A-5560, as introduced, would narrow the ability of local officials to evaluate small cell deployment applications from communications providers, effectively hindering the ability to fulfill public health and safety responsibilities during the construction and modification of these facilities. First, the 90-day "shot-clock" and "deemed approval" for application review is far too restrictive and goes beyond even the Federal Communications Commission's Declaratory Ruling and Third Report and Order (WT Docket No. 17-79, 17-84.)

Additionally, A-5560 not only infringes with municipalities' ability to manage public property but it also severely limits our ability to receive fair compensation for its use. A-5560 forces municipalities to give access to public property funded by property taxpayers so that for-profit wireless corporations can install their equipment to sell their private services. By eliminating fair market rate leases for use of taxpayer funded property, this proposal effectively gives corporations discounted access to these facilities with no requirement to pass their cost-savings onto their customers.

Furthermore, rents from the use of public property, which every other for-profit business pays, help pay for essential public services such as police, fire, libraries, and parks. A-5560 would set a dangerous precedent for other private industries to seek similar treatment to benefit their shareholders over constituent funded infrastructure, further eroding the ability to fund vital local services and adding additional burdens to New Jersey's property tax payers.

Ultimately, this proposal would have lasting impacts on the character of New Jersey's communities, while simultaneously creating a burden on taxpayers to subsidize the deployment of wireless infrastructure for private corporations. Wireless providers should instead be encouraged to work in collaboration with local governments and residents to deploy this critical infrastructure.

There is incentive enough for municipalities to collaborate with wireless providers. Local leaders want to see the buildout of robust wireless networks as we all rely on the internet to carry out our daily life, and more importantly to close the digital divide. However, in doing so, we should not restrict local authority and our ability to ensure the public, especially the traditionally underserved, receives the necessary compensation and benefits for the use of their property.

Specific Comments (League comments are italicized and bulleted.)

Section 2 – Definitions

"Collocate or Collocation" means mounting or installing an antenna facility on pre-existing structure, or modifying a structure for the purpose of mounting or installing an antenna facility on that structure.

- *This definition is very broad especially in the sense of "modifying a structure for the purpose…" there is seemingly no limit on the amount of modification that can occur.*

"Decorative Pole" means an authority pole that is specially designed and placed for aesthetic purposes and on which no appurtenances or attachments, other than small wireless facility, lighting….

- *Here definition of decorative pole would include allowing a small wireless facility being attached. Since the very nature of decorative poles is that they are installed for aesthetic purposes, small wireless facilities should not be able to attach to these poles by default and recommend the deletion of this concept.*

"Historic District" means a building property or site or group of building or sites that are either listed on the National Register of Historic places or formally eligible for listing, or listed on the NJ Register of Historic Places.

- *This definition is not broad enough to provide protections to many areas and sites protected and managed by NJ municipalities under the authority vested to them by the Municipal Land Use Law (MLUL). Areas or sites that are deemed a Historic District through local ordinances and under the MLUL are not necessarily on the Federal or State historic registry yet they still deserve to have the visual aesthetics maintained. The definition of historic district should be expanded to include any historic preservation district shown on the historic preservation plan element of the Master Plan.*

Section 3 b. – This section gives wireless providers the right as a permitted use not subject to zoning review or approval and without the need for municipal consent to:

1) Collocate small wireless facilities
2) Mount or install small wireless facilities on new or replacement poles
3) Install associated antenna equipment adjacent to a structure on which a small wireless facility is or will be collocated, mounted, or installed.
4) Install, modify or replace its own poles or with the permission of the owner a third party's poles along across upon and under the ROW

This section also allows wireless providers to have use of another person's poles without municipal consent which is otherwise required by NJSA 48:3-19. *This gives wireless providers a benefit not extended to utilities.*

- *This section is particularly troublesome given that the definition of collocate allows for the modification of structures without any seeming limit to what modifications can be made. For example, can a structure such as a billboard that also holds small cell wireless facilities be modified and if so to what extent? Could it be enlarged or perhaps modified even more to something that is beyond what it is currently zoned for?*
- *This section also seemingly allows poles to be placed anywhere, even where they currently do not exist, without zoning review or municipal consent. This is highly objectionable.*

Does the lack of zoning review or approval mean that a wireless provider does not need to follow zoning requirements such as set-backs and others?

Section 4 – This section deals with the installation of poles within the ROW and the height limitations thereof. The height of a new replaced or modified pole allowed in the ROW cannot exceed 50 feet above ground level **OR** ten percent taller than the tallest pole existing prior to the bill passing in the same ROW within 500 feet of the new pole, **whichever is greater**.

- *Standard utility poles are typically 40 feet tall sinking 6 feet into the ground so from the very beginning standard poles could be extended 10 feet with an increased height above ground of 16 feet. In addition the definition of pole is unclear, there is concern that this could be gamed and something that is more like a free standing antenna could be categorized as a pole thus allowing for other much larger poles to be installed, and installed 10% higher.*
- *The 500 foot designation seems arbitrary. There could be different zones adjacent to each other where each has a different pole height allowance. A wireless service provider would be allowed to install a new pole at a height not consistent with the zone simply because of the height of another pole within 500 feet, in a different zone, is taller.*

Section 5 – This section deals with the ability to set aesthetics requirements. Municipalities may set aesthetic standards for small wireless facilities, antenna, and poles in the right of way. These requirements must be:

- Reasonable; meaning they must be technically feasible and reasonably directed at avoiding or remedying unsightly or out-of-character deployments,
- No more burdensome than those applied to other types of infrastructure deployments,
- Objective, and
- Published in advance.

Design and concealment features will not be considered as part of the small cell wireless facility for purposes of size parameters.

A wireless provider is also permitted to collocate, modify, or replace decorative poles when necessary. The pole replacement may reasonably conform to the aesthetic requirements, but, only if technically feasible.

- *This section would effectively prohibit a municipality from seeking to "beautify" or improve aesthetics. Additionally, aesthetics requirements can only be "technically feasible" which is a term defined in the bill to mean that there is no reduction in the functionality of the small wireless facility. Using this definition any aesthetics requirements that would reduce the functionality of a wireless facility, even if de minimis, can be ignored. This is true even with decorative poles. It is entirely possible that a service provider could use this provision to avoid taking steps to comply with aesthetics requirements, especially if those requirements come at an additional cost.*

Section 6 – This section deals with the undergrounding of facilities. First, undergrounding requirements must conform to the same standards as the aesthetics requirements found in Section 5, meaning if undergrounding is not technically feasible the wireless service provider does not need to conform to these standards.

Second, undergrounding requirements are only enforceable on a wireless service provider if a municipality has required **all** electric and telecommunication lines to be placed underground by a date certain that is three months prior to the wireless service provider submitting and application.

If a municipality has an undergrounding requirement but has made certain exceptions and allowed for another pole to remain, that pole shall be made available for the wireless service provider's use. If the wireless provider cannot collocate on this pole then the provider may install another pole.

If an undergrounding requirement is adopted after the service provider has already installed poles and equipment then the municipality must allow the wireless provider to maintain the equipment on poles not required to be removed, or allow them to replace an existing pole within 50 feet of the prior location.

- *The criteria necessary for a municipality to require undergrounding are so onerous and the exception so broad that an undergrounding requirement is practically impossible to achieve or enforce. Paragraph a. 3. is essentially a general exception to any undergrounding requirement as it allows a pole to be installed anytime wireless service requires it.*

Section 7 –

"The authority may require a wireless provider to repair all damage to a right-of-way caused by the activities of the wireless provider and return the right-of-way to its functional equivalence before the damage, pursuant to the competitively neutral, reasonable requirements and specifications of the authority. If the wireless provider

fails to make the repairs required by the authority within a reasonable time after written notice, the authority may make those repairs and charge the applicable party the reasonable documented cost of the repairs."

- *This section should be amended to provide a municipality with additional tools to ensure repairs are made to the ROW. First, wireless providers must be given written notice that repairs need to be performed and must be given a "reasonable time" to perform those repairs. There is no indication of what a reasonable time is and should be clarified. Second, if a wireless provider fails to make the repairs the municipality can undertake those repairs and then charge the provider for the reasonable documented cost of the repairs. This language seemingly excludes the municipality from seeking the costs associated with collecting the charges. This section also fails to recognize the limitations on cash flow that would prevent a municipality from expeditiously making necessary repairs to the ROW. A possible solution to this would be to require the wireless provider post a reasonable bond and have the bond released only after the ROW is repaired. Section 18 of the bill deals more with bonding considerations.*

Section 8 – Section 8 states that a wireless provider is not required to replace or upgrade an existing pole unless needed for structural necessity or compliance with applicable codes.

- *It is unclear what applicable codes means. For example, is a municipal ordinance requiring standard poles be replaced with ornamental poles considered a code requirement? Likely not.*

Section 9 – This section deals with the wireless providers duty in regards to abandoned equipment.

1. A wireless provider must notify the municipality at least 30 days prior to abandoning small cell wireless equipment.
2. Following receipt of notice the authority shall direct the wireless provider to remove all or any portion of the facility or antenna equipment that it determines to be in the best interest of public safety.
3. Wireless provider must remove the equipment within 90 days. If it fails to remove the equipment the municipality may remove it and then charge the actual cost for doing so.

- *There are a variety of concerns with this section. First, there is no requirement that the wireless provider remove its equipment, it only needs to be removed after the municipality tells it to remove it. Second, a municipality can only have the abandoned equipment removed if it poses a risk to public safety –there is no ability to have the equipment removed for other reason such as aesthetics or simply needing space in the ROW. Third, there are the same concerns here as there are with Section 7 when dealing with the municipality doing the work and then attempting to collect from the wireless provider.*
- *In addition to recovering for the cost of removing abandoned equipment municipalities should be authorized to impose fines on a wireless service provider who fails to timely remove the abandoned equipment. The possibility of a fine would incentivize wireless providers to timely remove their abandoned equipment thus preventing municipalities from having to expend the additional resources to undertake these efforts themselves along with the efforts to then collect.*

Section 10 – The section prohibits municipalities from charging a fee to collocate, mount, or install small wireless facilities on new, modified, or replacement poles, or the replacement of an associated pole or antenna equipment.

- *This section should be removed entirely or greatly modified. Property taxpayers should not be required to subsidize fees for inspections and other reviews.*

Section 11 – This section outlines the permit requirements a municipality may impose. A permit may be required for:

- Collocation of a small wireless facilities already exempt from site plan review (NJSA 40:55D-46.2),
- Mounting or installation of a small wireless facility on a new modified or replacement pole,
- The installation, modification, or replacement of an associated pole or antenna equipment.

Each permit issued shall be of general applicability and shall not apply exclusively to a small wireless facility. Only one application shall be required for all activities associated with a permit issued pursuant to this section.

This section classifies all small wireless facilities as being a permitted use and not subject to zoning review or approval if they are located within any right-of-way in any zone.

The municipality cannot require the wireless provider to directly or indirectly provide any in-kind contributions or perform services such as reserving fiber, conduit or pole space for municipal use.

- *Paragraph 3 of this section is unclear and we believe includes drafting errors.*

A municipality may not require:

- Collocating, mounting, or installation of a small wireless facility on a specific pole or category of poles
- Multiple antenna facilities on a single pole
- The use of specific pole types or configurations when installing a new or replacement pole,
- The undergrounding of small wireless facility or antenna equipment that is or are designed in an application to be pole- or ground-mounted.

A municipality may not set minimum horizontal separation distance between existing small wireless facilities.

- *This allows for poles to be placed directly next to each other with a new wireless facility on each pole. This is significantly objectionable and should be amended or removed. The FCC Order speaks on this and does not set a limitation but instead allows spacing requirements to fall under aesthetic rules. Any state law should follow suit in this regard.*

A municipality may require an applicant to include an attestation that the facility will be operational for use within one year after the permit issuance date.

An application may be denied for the following reasons:

- The small wireless facility materially interferes with the safe operation of traffic control equipment,
- Materially interferes with sight lines or clear zones for transportation or pedestrians,
- Materially interferes with the federal ADA or similar state or federal standards regarding pedestrian access or movement,
- Fails to comply with reasonable and non-discriminatory horizontal spacing requirements
- Designates installation of a new pole within 7 feet in any direction of an electrical conductor, unless the wireless provider has written consent from the public utility that owns or manages the electrical conductor,
- Fails to comply with applicable codes or other section of the Act.
- *The fact that a permit can only be denied if there is materially interference with traffic control equipment, sight lines, and ADA requirements is far too high of a standard. Further we believe this to*

also be contradictory when considering the wireless provider can avoid any aesthetic requirements when doing so would reduce the functionality of the wireless facility, regardless of how de minimis.

- *Clarification is needed in regard to the application of non-discriminatory horizontal spacing requirements. This section seemingly anticipates horizontal spacing requirements applying to small cell wireless facilities yet section 11 b. 5. appears to prohibit any such spacing requirements in regard to small wireless facilities.*

If a permit is denied the municipality must provide written notice with specific reasons for the denial and send to the applicant on or before the day the authority denies the application. The provider may cure the deficiencies of an application and resubmit. If resubmitted within 30 days the applicant does not need to pay an additional application fee. Once resubmitted the municipality has 30 days to review.

- *A wholesale exemption from paying an additional application fee may not be warranted. There may be occasions where a reduced fee should be required. Regardless of what information is submitted a municipal employee would still be required to use their working time to review the application – this expense must be recouped and should not be borne by property taxpayers.*
- *Additionally, this language should be adjusted to allow a municipality their full amount of time to review an application. For example, if a municipality may quickly turn around and deny an application and the provider likewise quickly turn around and cure any deficiencies. Say this is all done within 14 days, well before the 60 day shot clock period but the municipality would not have a full 60 days for review – instead the 30 day period would apply. This could be remedied by inserting language such as "The authority shall approve or deny the revised application within 30 days of resubmission or any time remaining on the "shot clock" whichever is greater and limit its review to the deficiencies cited in the denial."*

An approved permit allows the wireless facility the right to operate and maintain the facility and any associated pole for a period of not less than 10 years, which must be renewed unless it fails to comply with paragraph (9) of the subsection (*paragraph 9 provides the reason why a permit can be denied)*.

The bill specifically prohibits moratoriums on issuing permits and anything else that would prohibit small wireless facilities from being deployed.

- *This is highly objectionable and should be deleted from the bill. A wholesale prohibition on a moratorium for permitting is bad policy. There are times when such a moratorium would be appropriate and a prohibition on such would eliminate this possibility putting at risk the health and safety of residents.*

A municipality may not require a permit for:

- Routine maintenance,
- The replacement of a small wireless facility or antenna equipment of substantially the same size or smaller,
- Installing micro wireless facilities.

Permit Review "Shot Clock"

The municipality has 10 days after an application is submitted to provide notice to wireless provider letting them know the application is either complete or incomplete. If incomplete the municipality must specifically identify in writing what the missing information is.

A municipality has 60 days to review the application for the collocation of a small cell wireless facility using an existing structure.

A municipality has 90 days to review the application for a permit involving the deployment of small wireless facility using a new or replacement pole. This 90 day period also applies to all "batched" or consolidated permit applications and sets no limit on the amount of facilities that can be included in the consolidated permit.

The processing deadline may be tolled by agreement between the municipality and applicant. An application is **deemed approved** if these deadlines are not met.

- *The FCC Order does not provide for deemed approval for not acting on an application within the shot clock. Additionally, while the FCC sets a similar 30 and 90 day shot clock these time periods are only presumptively reasonable periods of times, meaning they can be extended if a municipality has good reason.*
- *Batched or consolidated permits may include dozens of facilities that each equally require independent review yet these would have the same time to review as a single facility. This greatly reduces the ability of local officials to review applications. Further, the penalty for failing to timely review these applications would be a deemed approval which could have grave consequences.*

Section 14 – This section deals with make-ready work.

Rates, fees, and terms and conditions for make-ready work must be non-discriminatory and competitively neutral, and commercially reasonable.

A good faith estimate for make-ready work must be provided to the wireless provider within 60 days after receipt of a complete application.

Make-ready work must be completed within 60 days of written acceptance of the good faith estimate by the wireless provider. The only work that can be included in make-ready work is work needed to comply with codes or industry standards. Fees for make ready work can only be actual costs.

- *The time requirement to provide an estimate and to complete the work should be expanded. In addition, there must be a time limit put on the time which the applicant must accept the good faith estimate. Current industry practice appears to set a limit of 14 days or whenever the estimate is retracted, whichever is later.*

Section 15 – Permits, Rate and Fees

This section deals with the permissible amount of rates and fees a municipality can charge a wireless provider.

$500 – Up-front application for collocation of a small wireless facility that includes up to 5 small wireless facilities and an additional $100 for each small wireless facility above 5. (*This is in line with the FCC Order)*

$1,000 – for the installation of a new pole, together with the mounting or installation of an associated small wireless facility.

$20 – per small wireless facility, per year, for use of the ROW. (*The FCC Order sets $270 for total recurring fees)*

$100 – per pole, per year, for use of authority pole. (*FCC Order set $270 for total recurring fees)*

- *The FCC Order does not set hard cap on maximum application fees, or, pole or ROW access fees. The FCC Order simply created a presumptively valid maximum fee that state and local jurisdictions could go beyond so long as they had proper justification. The language in this section of the bill sets a hard cap, one that is far below the FCC Order's presumptive validity, for all municipalities. NJ has some of the highest property values in the country and within NJ itself those property values vary greatly. To establish a standard fee for all municipalities across the state, especially when that fee is smaller than a fee that would be presumptively valid in any other state, is highly objectionable. It is very likely that given the value of property and the market in NJ a fee even higher than the FCC's presumptively valid fee would be justified.*

Section 16 – This section deals with other fees and taxes, and prohibits another fee or tax from being charged on the placement or operation of "communication facilities in the right-of-way by a communications service provider…"

- *This section no longer refers to wireless providers and instead uses the term "communications service provider." Our concern here is that this is so broad that it may encompass other entities besides wireless providers and may have an impact on property taxes and the business personal property tax (BPPT.) This section will need to be clarified.*
- *Would it be possible to avoid utility fees and taxes if all utility poles were replaced by wireless provider poles?*

Section 17 – This section deals with non-conforming and previously adopted ordinances.

A municipality may not require a wireless provider to enter into an agreement with them but a voluntary agreement may still be entered into.

Ordinances or agreements of and between a municipality and a wireless provider already in place but do not comply with this bill will be enforceable only for those facilities installed **and** operational prior to the bill. However, these agreements and ordinances not in compliance with the bill we become void 181 days after the effective date of the legislation.

- *This section in effect removes the applicability of a "savings clause" in any ordinance adopted after the effective date of the bill. In other words, if one part of the ordinance is invalid, by law the entire ordinance would be invalid and there would be no local regulation until a fully compliant ordinance is adopted.*
- *This section of the bill would also work to invalidate already approved agreements and ordinances. Why should an agreement made at arms-length be undone? Wouldn't these agreements be a true indicator of what the market would dictate?*

Section 18 – This section provides authority for a municipality to adopt reasonable indemnification, insurance, and bonding requirements.

A municipality cannot be indemnified or held harmless against claims unless a court first finds that it was the negligent action of the wireless provider that caused the harm that created the claim.

A municipality may require the provider to carry insurance however:

- The municipality may not require the provider to obtain insurance naming the municipality or its officers as an additional insured.

- The municipality can require proof of insurance prior to the effective date of a permit to begin wireless facility work.

A municipality may require bonding requirements on a wireless provider if they require the same from other rights-of-way users. The purpose of the bonds is to provide for the removal of abandoned or improperly maintained wireless facilities, restoration of the ROW, or to recoup fees that have not been paid for a period of 12 months after proper notice to the wireless provider.

Bonding requirements may not exceed $200 per small wireless facility with a cap at $10,000 for all facilities within the municipality. These bonds may be combined into one instrument.

- *A municipality should be indemnified and held harmless from a wireless service provider. It is bad public policy to prohibit this and to require that a court first find the service provider responsible for negligent actions opens the potential to costly litigation simply for the municipality to be indemnified.*
- *It is not fair to ask property taxpayers to wait 12 months before being able to recoup unpaid fees. This would amount to interest free loan to the service providers.*
- *The limitation on the amount of bonding requirements seems to be arbitrary and not related to costs of removal of abandoned equipment or restoration of the ROW. All bonding requirements must be increased to at the very least levels that would cover the purpose for such a bond.*

We would appreciate your consideration of these comments and would welcome the opportunity to meet to discuss this legislation. Questions can be directed to me or Frank Marshall, the League Staff Attorney, at 609-695-3481 x137, fmarshall@njlm.org.

Thank you.

Very truly yours,

Michael F. Cerra

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Assistant Executive Director

MFC:fm/sc

c: Assemblyman Louis Greenwald
Assemblyman Wayne DeAngelo
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