SPONSOR: Rep. Mitchell & Sen. Poore & Sen. McDowell & Sen. Pettyjohn
Reps. Briggs King, Carson, Gray, Hudson, Q. Johnson, Keeley, Longhurst, Miro, Osienski, Schwartzkopf, D. Short, Viola, Wilson; Sens. Delcollo, Ennis, Lavelle, Lopez

HOUSE OF REPRESENTATIVES
149th GENERAL ASSEMBLY

HOUSE BILL NO. 189

AN ACT TO AMEND TITLE 17 OF THE DELAWARE CODE RELATING TO HIGHWAYS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Three-fifths of all members elected to each house thereof concurring therein):

Section 1. Amend Title 17 of the Delaware Code by inserting a new Chapter 16 as shown by underlining as follows:

§ 1601. Short Title.

This Chapter shall be known as the "Advanced Wireless Infrastructure Investment Act."

§ 1602. Findings of Public Policy.

The General Assembly finds and declares as follows.

(1) To foster economic development in this State, responsible and reasonable investment in and development of wireless communications systems employing advanced technology shall be encouraged as an integral part of the State's infrastructure.

(2) The design, engineering, permitting, construction, modification, maintenance, and operation of wireless facilities are instrumental to the provision of emergency services, and to increasing access to advanced technology and information for the citizens of Delaware.

(3) The Department of Transportation in accordance with 17 Del. C. §131(a) is responsible for the absolute care, management and control of the State rights of way.

(4) Wireless services providers and wireless infrastructure providers are not public utilities under 102(2) of Title 26, but need access to the State rights of way and the ability to attach to poles and structures in the State rights of way to densify their networks and provide next generation services subject to the same policies and procedures as public utilities for accommodation in the State rights of way.

(5) Small wireless facilities, including facilities commonly referred to as small cells and distributed antenna systems, often may be deployed most effectively in the State rights of way.

(6) Accordingly, expeditious processes and reasonable and nondiscriminatory rates and terms related to such deployments are essential to the construction and maintenance of wireless facilities.

(7) Wireless facilities help ensure the State remains competitive in the global economy.

(8) The timely design, engineering, permitting, construction, modification, maintenance, and operation of wireless facilities are declared to be matters of Statewide concern and interest.

§ 1603. Definitions.

As used in this chapter, unless the context otherwise requires:

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

(2) "Applicable codes" means uniform building, fire, electrical, plumbing, or mechanical codes adopted by a recognized national code organization or local amendments to those codes enacted solely to address imminent threats of destruction of property or injury to persons to the extent not inconsistent with the terms of this Chapter. The term shall also include the highway engineering manuals, regulations, design standards and guidance adopted by the Department to ensure the safety of travelers on Delaware's roadways and the provision of roadside safety for errant vehicles.

(3) "Applicant" means any person who submits an application and is a wireless provider.

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

(5) "Collocate" means to install, mount, maintain, modify, operate, or replace wireless facilities on or adjacent to a small wireless support structure or utility pole.

(6) "Collocation" has a corresponding meaning.

(7) "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.

(8) "Department" means the Delaware Department of Transportation.

(9) "Department pole" means (i) a pole owned or operated by the Department in the ROW, including, a camera pole, roadway lighting pole, traffic signal strain pole and overhead sign structure.

(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 small wireless facility that is not larger in dimension than 24 inches in length, 15 inches in width, 12 inches in height and that has an exterior antenna, if any, no longer than 11 inches.

(14) “Permit” means a written authorization required by the Department to perform an action or initiate, continue, or complete a project.

(15) “Person” means an individual, corporation, limited liability company, partnership, association, trust, or other entity or organization, including the Department.

(16) “Rate” means a recurring charge.

(17) “State rights of way” or “ROW” means the area on, below, or above or across public roads, causeways, highways, bridges in the State which have been or may hereafter be constructed, acquired, or accepted by the Department. The term does not include any public roads, causeways, highways and bridges that are considered a controlled access facility as defined in 17 Dec. C. §172.

(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 28 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) “Small wireless support structure” means a freestanding structure, such as a monopole; tower, either guyed or self-supporting; billboard; or, other existing or proposed structure that complies with the height restrictions in §1606(g) designed to support or capable of supporting wireless facilities. Such term shall not include a utility pole.

(20) “Utility pole” means a pole or similar structure owned by a public utility located in the ROW. Such term shall not include structures supporting only wireless facilities.

(21) “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. The term does not include (1) the structure or improvements on, under, or within which the equipment is collocated, (2) wireline backhaul facilities, or (3) coaxial or fiber optic cable that is between utility poles or wireless support structures or that is otherwise not immediately adjacent to or directly associated with a particular antenna.

(22) "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, pursuant to an agreement with a wireless service provider. The term does not include a wireless services provider.

(23) "Wireless provider" means a wireless infrastructure provider or a wireless services provider.

(24) "Wireless services" means any services provided using licensed or unlicensed spectrum, whether at a fixed location or mobile, using wireless facilities.

(25) "Wireless services provider" means a person who provides wireless services.

§ 1604. Applicability; Exclusive Use Prohibited.

(a) The provisions of this Chapter shall only apply to activities of a wireless provider within the ROW, over which the Department has absolute control.

(b) The Department may not enter into an exclusive arrangement with any person for use of the ROW for the construction, operation, marketing, or maintenance of wireless facilities or small wireless support structures or the collocation of small wireless facilities.

§ 1605. Fees.

The Department may not charge a wireless provider an application fee or fee or rate for the use of the ROW with respect to the construction, installation, mounting, maintenance, modification, operation, or replacement of a wireless facility or small wireless support structure in the ROW, including collocation in such ROW. However, wireless providers shall pay the actual, reasonable costs borne by the Department attributable to the processing and administration of a program to authorize the accommodation, review and issuance of construction permits, and conduct inspections of wireless facilities in the ROW if necessary. Such fees shall not exceed $100 for each small cell facility on a permit application. If there are additional non-recurring expenses associated with inspections for new installations or construction, wireless providers shall pay the actual, reasonable cost borne by the Department attributable to each provider's inspections where it exceeds the permit fee collected. In any controversy concerning the appropriateness of the fee, the Department shall have the burden of proving that the fees are reasonably related to the actual, direct and reasonable costs incurred. Micro wireless facilities are not subject to such processing and administration costs.

§ 1606. Right of Access.

(a) To the extent permitted by this Chapter, a Wireless Provider shall have the right to collocate wireless facilities and install, construct, modify, maintain, and operate utility poles, small wireless support structures, along, across, upon, and under the ROW subject to the following requirements.

(b) The Department may impose requirements that conform to applicable codes on new installations of above ground fixed obstructions within the clear zone of any roadway.

(c) Wireless support 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 or wireless providers.

(d) The Department shall have the authority to grant an accommodation to access the ROW to a wireless infrastructure provider if it has a contract with a wireless service provider to install, construct, modify, maintain or operate utility poles, small wireless support structures or wireless facilities in the ROW under which such installation or construction is to begin within one year of access.

(e) Installation shall be collocated on existing infrastructure already located in the right of way wherever feasible except that the wireless provider shall not attach or otherwise collocate its equipment, facilities, fixtures or any appurtenant structures or devices to State-owned infrastructure except as specified in **§** 1613.

(f) The wireless provider shall not attach its equipment, facilities, or fixtures to utility poles or to privately-owned structures without the express written consent of the owner.

(g) Each new or modified utility pole and small 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 Act located within 500 feet of the new pole in the same ROW; or (ii) 50 feet above ground level. New small wireless facilities in the ROW may not extend (i) more than ten feet above an existing utility pole or small wireless support structure in place as of the effective date of this Act; or (ii) above the height permitted for a new utility pole or small wireless support structure under this section. The height limitations do not apply to the placement of any small wireless facility on a utility pole constructed on or before June 30, 2017, if the small wireless facility does not extend more than 10 feet above the structure.

(h) Subject to the provisions of § 1609(b)(5), the Department may not require the placement of small wireless facilities on any specific utility pole or category of utility pole or require multiple antenna systems on a single pole.

(i) Subject to the provisions of § 1609(b)(5), the Department may not limit the placement of small wireless facilities by minimum separation distances.

(j) The Department, at its discretion, shall have the authority to approve a wireless provider's request to construct, modify and maintain a utility pole, small wireless support structure or wireless facility or other structure that exceeds these size limits along, across, upon and under the ROW.

§ 1607. Use & Occupancy Agreement.

(a) The Department is authorized to enter into Use & Occupancy Agreements with wireless providers for the accommodation of wireless facilities in the ROW under terms that:

(1) protect the safety of travelers on Delaware's roadways;

(2) minimize conflicts with the use of the State's rights of way for the primary purpose of transportation;

(3) facilitate the placement of small wireless facilities at locations that do not unreasonably interfere with existing public uses; and

(4) are competitively neutral and nondiscriminatory.

(b) Such agreements shall be for a term of 10 years with an option to renew for additional 5 year terms.

(c) Such agreements are non-assignable and non-transferable without the reasonable consent of the Department that the assignee or transferee has the financial, technical, organizational and managerial resources needed to operate in the ROW and protect the public health, safety and welfare.

(d) Each wireless provider holding a valid Use & Occupancy Agreement shall comply with the Underground Utility Damage Prevention and Safety Act, 26 Del. C. § 801, et seq. to the extent applicable.

§ 1608. Relocation of small wireless facilities.

Whenever it becomes necessary to relocate any wireless facility due to expansion of the transportation system or if it is found to interfere unreasonably with the ingress and egress to adjacent properties or their development, or for reasons deemed in the public interest by the Department, the wireless provider shall relocate its small wireless facility at its sole expense to a location mutually agreed upon by the wireless provider and the Department at a time and manner prescribed by the Department.

§ 1609. Permits.

(a) The wireless provider shall acquire one or more permits to collocate a small wireless facility or construct, modify, maintain, and operate utility poles or small wireless support structures in the ROW provided such permits are of general applicability and do not apply exclusively to wireless facilities.

(b) The Department shall receive applications for, process, and issue such permits subject to the following requirements.

(1) The Department may not 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 Department including reserving fiber, conduit, or pole space for the Department.

(2) An applicant shall not be required to provide more information to obtain a permit than communications service providers that are not wireless providers.

(3) Within fourteen days of receiving an application, the Department will determine and notify the applicant whether the application is complete. If an application is incomplete, the Department must specifically identify the missing information.

(4) An application shall be processed on a nondiscriminatory basis and deemed approved if the Department fails to approve or deny it within 60 days. The parties may mutually agree to extend the 60 day application review period. The Department shall grant or deny the application at the end of the extended period.

(5) The Department shall approve an application unless the Department finds that it fails to comply with any of the following:

a. Applicable codes or, to the extent feasible, applicable provisions of the Delaware Utilities Manual Regulations, 2 Del. Admin. Code 2401, unless or until the Secretary of the Department promulgates regulations specific to accommodation of wireless service providers in the State ROW;

b. Public safety;

c. Objective, reasonable design standards and stealth and concealment requirements;

d. Undergrounding requirements that prohibit the installation of new or modification of existing utility poles in a right of way without prior approval, if such requirements include a waiver or another process that addresses request to install such new utility poles or modify existing utility poles and do not prohibit the replacement of utility poles; or

e. The Department's reasonable spacing requirements that determine the distance between utility poles based on best engineering practices and the facilities that will be attached thereto, if such requirements include a waiver or another process that addresses requests for exception or variance and do not prohibit granting of such exceptions or variances. Designs should be performed to maximize the spacing and to limit the quantity of poles utilized.

(6) The Department must document the basis for a denial, including the specific applicable code provisions on which the denial was based, and send the documentation to the applicant on or before the day the Department denies an application. The applicant may cure the deficiencies identified by the Department and resubmit the application within 30 days of the denial. The Department shall approve or deny the revised application within 15 days. Any subsequent review shall be limited to the deficiencies cited in the denial.

(7) To the extent possible, wireless providers shall plan their installations in a comprehensive manner based on geographic areas or proximate roadways, file a consolidated application and receive a single permit for the collocation of multiple small wireless facilities.

(8) The Department may not institute, either expressly or de facto, a moratorium on issuing permits or other approvals for the collocation of small wireless facilities or construction, modification, and operation of utility poles or small wireless support structures in the ROW. However, the Department may issue a temporary moratorium related to a particular road or limited geographic area where exigent circumstances exist that directly impact the public health, safety or welfare.

(9) Unless otherwise required by applicable code, the Department shall not require an application approval or permit or require fees or rates for (i) routine maintenance; or (ii) the replacement of wireless facilities with wireless facilities that are substantially similar or the same size or smaller or (iii) the installation, placement, operation, maintenance, or replacement of micro wireless facilities that are suspended on cables that are strung between existing utility poles in compliance with applicable codes.

§ 1610. No Discrimination.

The Department, 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.

§ 1611. Limitation of ROW Authority.

The approval of the installation, placement, maintenance, or operation of a small wireless facility pursuant to this subsection does not authorize the provision of any voice, data, or video communications services or the installation, placement, maintenance, or operation of any communications facilities other than small wireless facilities in the right-of-way.

§ 1612. Damage and Repair.

The Department 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, small 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 Department. If the wireless provider fails to make the repairs required by the Department within a reasonable time after written notice, the Department may effect those repairs and charge the applicable party the reasonable, documented cost of such repairs.

§ 1613. Access to Department Land and Structures.

The Department will allow for the collocation of small wireless facilities on Department poles as determined by the Department subject to the following:

1. A person owning or controlling Department Poles may not enter into an exclusive arrangement with any person for the right to attach to such poles.

2. Such collocations shall be subject to reasonable, cost-based, competitively neutral and nondiscriminatory rates, fees and terms as provided in an agreement between the Department and the wireless provider.

3. The Department and wireless provider shall negotiate in good faith to arrive at mutually agreeable contract terms and conditions.

4. The annual recurring rate to collocate a small cell facility on a Department pole shall not exceed the actual, direct and reasonable costs related to the wireless service provider's use of space on the pole. In any controversy concerning the appropriateness of the rate, the Department 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.

§ 1614. Collocation on Department wireless support structures, utility poles and land outside the ROW.

The Department may authorize wireless facilities on small wireless support structures, other structures that exceed the height limitations in §1606(g), and utility poles on lands owned or controlled by the Department that are not located within the ROW. Such collocations shall be subject to reasonable, cost-based, competitively neutral and nondiscriminatory rates, fees, and terms as provided in an agreement between the Department and the wireless provider.

SYNOPSIS

The "Advanced Wireless Infrastructure Investment Act" creates a new Chapter 16 of Title 17 that will accelerate investment in mobile broadband infrastructure and ready the State for the next wave of economic development in the digital economy. In recognition of the shift from landline to wireless communications, the Act authorizes wireless providers access to the State's rights of way and establishes a Statewide policy for deployment of small wireless cells to meet the growing demand for wireless services which provide Delaware citizens with access to advanced technology, information and 911 services.