The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL:	CS/SB 596
INTRODUCER:	Communications, Energy, and Public Utilities Committee and Senator Hutson and others
SUBJECT:	Utilities
DATE:	March 24, 2017
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wiehle	Caldwell	CU	**Fav/CS**
2.	Peacock	Ferrin	GO	**Pre-meeting**
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 596 creates the Advanced Wireless Infrastructure Deployment Act. Put very simply, it creates a process for gaining access to and use of public rights-of-way in connection with the installation of small wireless communications infrastructure.

The bill creates a process and time limits for review and approval of applications by an authority (Department of Transportation or local government entities that have jurisdiction and control of public roads). The authority must approve a complete application unless it does not meet the authority's applicable codes, defined to include "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 threats of destruction of property or injury to persons," and qualifying government historic preservation zoning regulations. This excludes consideration and application of zoning, land use, aesthetic ordinances, and of any other source of public safety protections.

The bill provides for application or permit fees and collocation or pole attachment fees. Collocation fees cannot exceed $15.00 per year per authority utility pole. Collocation fees include the costs to alter a pole to strengthen it to support the installation of the wireless infrastructure, including costs to replace a pole if necessary. They do not include any consultant fees or expenses.

The bill does not authorize a person to collocate small wireless facilities on a privately owned utility pole, a utility pole owned by an electric cooperative, a privately owned wireless support structure, or other private property without the consent of the property owner.
The bill takes effect July 1, 2017.

II. Present Situation:

Use of Right-of-Way by Communications Services Providers

Section 337.401, F.S., authorizes the Department of Transportation (DOT or the department) and local governmental entities that have jurisdiction and control of public roads (jointly referred to as the or an authority) to prescribe and enforce reasonable rules or regulations for placing and maintaining of structures across, on, or within the right-of-way limits of a road. An authority may authorize any person who is a resident of this state or any corporation either organized under the laws of this state or licensed to do business within this state to use a right-of-way for the utility[1] in accordance with the authority's adopted rules or regulations.[2] The statute prohibits a utility from installing, locating, or relocating within a right-of-way unless authorized by a written permit.[3] The permit must require the permitholder to be responsible for any damage resulting from the use of the right-of-way.[4]

Municipal and county rights-of-way access rules and regulations relating to communications services providers must be reasonable and nondiscriminatory and must be generally applicable to all providers of communications services.[5] The rules and regulations must be "generally applicable" to all such providers and may not require such providers to apply for or enter into an individual license, franchise, or other agreement as a condition of using the right of way.[6]

A municipality or charter county may require and collect permit fees from any providers of communications services that use or occupy municipal or county roads or rights-of-way.[7] To ensure nondiscriminatory and competitively neutral permit fees for communications services providers, municipalities and charter counties must elect to collect permit fees for use of the right-of-way in one of two ways. First, the local government can elect to require the payment of fees from any such providers, provided that the fees are "reasonable and commensurate with the direct and actual cost of the regulatory activity," "demonstrable," and "equitable among users of the roads or rights-of-way."[8] If the local government makes this election, the rate of its local

[1] Existing paragraph 337.401(1)(a), F.S., refers to "any electric transmission, telephone, telegraph, or other communications services lines; pole lines; poles; railways; ditches; sewers; water, heat, or gas mains; pipelines; fences; gasoline tanks and pumps; or other structures referred to in this section and in ss. 337.402, 337.403, and 337.404 as the 'utility'." This indirectly defines the term "utility" not by type of entity or by type of service provided but by the type of structure some type of entity might use in providing some type of service.
[2] Section 337.401(2), F.S.
[3] *Id*.
[4] *Id*.
[5] Section 337.401(3)(a), F.S.
[6] *Id*.
[7] Section 337.401(3)(c)1.a.(I), F.S.
[8] Section 337.401(3)(c)1.a.(I)., F.S. Such costs include the costs of issuing and processing permits, plan reviews, physical inspection, and direct administrative costs.

communications service tax[9] is automatically reduced by a rate of 0.12 percent. Second, the local government can elect not to require payment of fees from any such provider and may increase its local communications service tax by a rate of up to 0.12 percent. A noncharter county may make the same election. If it chooses not to impose permit fees, it may increase its local communications service tax by a rate of up to 0.24 percent to replace the revenues it would have received for such permit fees.[10]

Local Government Pole Attachment Fees

With certain exceptions, the authority of a public body[11] to require taxes, fees, charges, or other impositions[12] from dealers of communications services for occupying its roads and rights-of-way is specifically preempted by the state.[13] Among the taxes, fees, and charges *not* preempted[14] are the following:

- Pole attachment fees charged by a local government for attachments to its utility poles.
- Amounts charged for the rental or other use of property owned by a public body which is not in the public rights-of-way to a dealer of communications services for any purpose, including, but not limited to, the placement or attachment of equipment used in the provision of communications services.
- Permit fees related to placing or maintaining facilities in or on public roads or rights-of-way pursuant to s. 337.401, F.S.

Accordingly, local governments may establish pole attachment fees for communications services facilities by ordinance or agreement.

Collocation of Wireless Communications Facilities in DOT Rights-of-Way

With respect to property acquired for state rights-of-way, the DOT is responsible for negotiating leases that provide access for wireless communications facilities.[15] Payments required under such leases must be reasonable and reflect the market rate for the use of the state government-owned property. DOT is authorized to adopt rules for granting such leases, including terms and conditions.[16]

The DOT has entered into three competitively bid leases that allow the lessee to place wireless facilities on the DOT's rights-of-way or to sublease those rights to a third-party for the same

[9] Local communications services taxes are authorized and governed by ch. 202, F.S.
[10] Section 337.401(3)(c)2., F.S.
[11] Section 1.01(8), F.S., provides that a "public body" includes counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state.
[12] Section 202.24(2)(b), F.S., provides, in part, that a tax, charge, fee, or other imposition includes any amount or in-kind payment of property or services which is required by ordinance or agreement to be paid or furnished to a public body by or through a dealer of communications services in its capacity as a dealer of communications services.
[13] Section 202.24(1), F.S.
[14] *See* s. 202.24(2)(c), F.S.
[15] Section 365.172(13)(f), F.S.
[16] *Id.*

purpose.[17] The DOT indicates that it derives an income stream from each of these agreements.[18] The DOT Turnpike System, which includes the Western Beltway, Suncoast Parkway, Veterans Expressway, I-4 connector, Polk Parkway, Sawgrass Expressway, Turnpike Mainline, Beachline Expressway, and Seminole Expressway, is not subject to rights-of-way leases for wireless facilities.[19]

Federal Law on Wireless Facilities Siting

The FCC interprets and implements certain provisions of federal law that are designed, among other purposes, to "remove barriers to deployment of wireless network facilities by hastening the review and approval of siting applications by local land-use authorities."[20] These statutory provisions preserve state and local governments' authority to control the "placement, construction, and modification of personal wireless service facilities" and to manage "use of public rights-of-way," but they prohibit state and local governments from using certain unreasonable criteria in making such decisions.[21] Under the authority granted by these provisions, the FCC has issued orders to clarify the "maximum presumptively reasonable time frames for review of siting applications and the criteria local governments may apply in deciding whether to approve them."[22]

Federal law establishes that state and local governments may not establish laws, regulations, or other requirements that prohibit or have the effect of prohibiting the ability of any entity to provide personal wireless services[23] or other telecommunications services.[24] The FCC has interpreted these provisions as precluding state or local government actions that materially inhibit the ability of an entity to compete in a fair and balanced legal and regulatory environment. Federal circuit courts have varied on the particular standards to apply in this area.[25]

Further, federal law provides that state and local governments may manage the public rights-of-way and may require fair and reasonable compensation from telecommunications providers for use of those rights-of-way on a nondiscriminatory basis.[26] The FCC has not interpreted this

[17] Florida Department of Transportation, SB 596 Legislative Bill Analysis (Jan. 30, 2017)(Copy on file with the Governmental Oversight and Accountability Committee*)*. The analysis identifies the following leases: American Tower/Lodestar, entered into on March 25, 1999, with a thirty-year term; Rowstar #1, entered into on December 4, 2014, with a ten-year term, extendable for up to four additional ten year terms at the discretion of Rowstar; and Rowstar #2, entered into on December 29, 2016, with a ten-year term, extendable for up to four additional ten year terms at the discretion of Rowstar.
[18] *Id.*
[19] *Id.*
[20] *See* FEDERAL COMMUNICATIONS COMMISSION, *Comments Sought on Mobilitie, LLC Petition for Declaratory Ruling and Possible Ways to Streamline Deployment Of Small Cell Infrastructure* (*FCC 2016 Notice*), WT Docket No. 16-421, DA 16-1427, December 22, 2016, at p. 2; 47 U.S.C. §§253, 332(c)(7), and 1455(a).
[21] *Id.* at p. 5, citing 47 U.S.C. §§253(c) and 332(c)(7)(A).
[22] *Id.* at p. 2
[23] Under 47 U.S.C. 332(c)(7), "personal wireless services" are defined as "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services."
[24] *FCC 2016 Notice* at p. 10, citing 47 U.S.C. §§253(a) and 332(c)(7).
[25] *Id.*
[26] *Id.* at p. 12, citing 47 U.S.C. §253(c).

provision, and federal circuit courts have varied on the issue of what constitutes "fair and reasonable" compensation.[27]

In December 2016, in response to a petition for declaratory ruling, the FCC issued a public notice seeking comment on streamlining the deployment of small cell infrastructure by improving wireless facilities siting policies.[28] In its notice, the FCC summarized the issues:

> To satisfy consumers' rapidly growing demand for wireless broadband and other services, wireless companies are actively expanding the network capacity needed to maintain and improve the quality of existing services and to support the introduction of new technologies and services. In particular, many wireless providers are deploying small cells and distributed antenna systems (DAS) to meet localized needs for coverage and increased capacity in outdoor and indoor environments. Although the facilities used in these networks are smaller and less obtrusive than traditional cell towers and antennas, they must be deployed more densely – i.e., in many more locations – to function effectively. As a result, local land-use authorities in many areas are facing substantial increases in the volume of siting applications for deployment of these facilities. This trend in infrastructure deployment is expected to continue, and even accelerate, as wireless providers begin rolling out 5G services.
>
> This creates a dilemma. We recognize, as did Congress in enacting Sections 253 and 332 of the Communications Act, that localities play an important role in preserving local interests such as aesthetics and safety. At the same time, the Commission has a statutory mandate to facilitate the deployment of network facilities needed to deliver more robust wireless services to consumers throughout the United States. It is our responsibility to ensure that this deployment of network facilities does not become subject to delay caused by unnecessarily time-consuming and costly siting review processes that may be in conflict with the Communications Act.

The stated purpose of the FCC's request for comments is to develop a factual record to assess whether and to what extent the process of local land-use authorities' review of siting applications is hindering, or is likely to hinder, the deployment of wireless infrastructure. Among the matters on which the FCC is seeking comment and guidance are questions specifically related to access to state and local government rights-of-way and the fees imposed for such access.[29] The FCC indicated that this "data-driven evaluation will make it possible to reach well-supported decisions on which further Commission actions, if any, would most effectively address any problem, while preserving local authorities' ability to protect interests within their purview."[30]

[27] *Id.* at p. 13.
[28] *Id.*
[29] *Id.* at pp. 8-14.
[30] *Id.* at p. 2.

Deployment of Small Wireless Facilities in Florida

Wireless service providers and wireless infrastructure providers have begun the deployment of small cell wireless infrastructure in various jurisdictions within Florida. These providers indicate that their efforts have been hampered to varying degrees by some local governments that have imposed conditions or moratoria on the siting of small cell facilities.[31] In general, these moratoria indicate that they are temporary measures designed to allow the local government to review their standards, regulations, and requirements related to siting of wireless communications facilities to address small cell facilities.[32] In one instance, the municipality has renewed its moratoria on multiple occasions, extending its effect from the original six months to over 30 months.[33]

III. Effect of Proposed Changes:

The bill creates the Advanced Wireless Infrastructure Deployment Act, a new subsection s. 337.401(7), F.S.

Definitions

The bill creates definitions, including the following related to wireless entities:

- An "applicant" is a person who submits an application and is a wireless provider.
- An "application" is a request submitted by an applicant to an authority for a permit to collocate small wireless facilities.
- A "wireless provider" is a wireless services provider or a wireless infrastructure provider.
- A "wireless services provider" is a person who provides wireless services.
- "Wireless services" are any services provided using licensed or unlicensed spectrum, whether at a fixed location or mobile, using wireless facilities.
- A "wireless infrastructure provider" is a person certificated to provide telecommunications service in the state and who builds or installs wireless communication transmission equipment, wireless facilities, or wireless support structures, but is not a wireless services provider.

The bill defines four types of wireless infrastructure:

- A "wireless facility" is equipment at a fixed location which enables wireless communications between user equipment and a communications network, including radio transceivers, antennas, wires, coaxial or fiber optic cable or other cables, regular and backup power supplies, and comparable equipment, regardless of technological configuration, and equipment associated with wireless communications. The term includes small wireless facilities. The term does not include:
  - The structure or improvements on, under, within, or adjacent to the structure on which the equipment is collocated;
  - Wireline backhaul facilities; or

[31] Several municipalities and counties have adopted moratoria, including the City of Fort Lauderdale, the City of Tallahassee, and Pinellas County.
[32] *See, e.g.,* City of Tallahassee, Resolution No. 16-R-42, December 2016.
[33] City of Fort Lauderdale, Resolution No. 17-30, February 21, 2017.

  - 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.
- A "small wireless facility" is a wireless facility that meets both the following qualifications:
  - Each antenna associated with the facility is located inside an enclosure of no more than six cubic feet in volume or, in the case of antennas that have exposed elements, each antenna and all of its exposed elements could fit within an enclosure of no more than six cubic feet in volume; and
  - 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 meters, concealment elements, telecommunications demarcation boxes, ground-based enclosures, grounding equipment, power transfer switches, cut-off switches, vertical cable runs for the connection of power and other services, and utility poles or other support structures.
- A "micro wireless facility" is a small wireless facility having dimensions no larger than 24 inches in length, 15 inches in width, and 12 inches in height and that has an exterior antenna, if any, no longer than 11 inches.
- An "antenna" is communications equipment that transmits or receives electromagnetic radio frequency signals used in providing wireless services.

The bill defines three types of structures on which an applicant may seek to locate infrastructure:
- An "authority utility pole" is a utility pole owned by an authority in the right-of-way. The term does not include a utility pole owned by a municipal electric company.
- A "utility pole" is a pole or similar structure that is used in whole or in part to provide communications services or for electric distribution, lighting, traffic control, signage, or a similar function.
- A "wireless support structure" is a freestanding structure, such as a monopole, a guyed or self-supporting tower, a billboard, or another existing or proposed structure designed to support or capable of supporting wireless facilities. The term does not include a utility pole.

The bill also creates the following definitions:
- "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 threats of destruction of property or injury to persons. The term also includes local government historic preservation zoning regulations consistent with the preservation of local zoning authority under 47 U.S.C s. 332(c)(7), the requirements for facility modifications under 47 U.S.C. s. 1455(a), or the National Historic Preservation Act of 1966, as amended, and the regulations adopted to implement these laws.
- The bill does not define "authority," however existing s. 337.401(1)(a), F.S., does indirectly, stating: "The department and local governmental entities, referred to in this section and in ss. 337.402, 337.403, and 337.404, F.S., as the 'authority'…." The department here is the Department of Transportation (DOT or the department).
- "Collocate" or "collocation" means to install, mount, maintain, modify, operate, or replace one or more wireless facilities on, under, within, or adjacent to a wireless support structure or utility pole.
- "FCC" means the Federal Communications Commission.

Application

The process necessarily begins with an application; however, the bill does not expressly authorize an authority to develop a form or to require that an applicant provide specific information, although it does contain statements that *imply* some level of authorization. For example, it prohibits an authority from requiring an applicant to provide more information to obtain a permit than is required of electric service providers and other communications service providers that are not wireless service providers.[34] A proponent has argued that this prohibition against requiring more information *indirectly authorizes* an authority to require an applicant to provide the same information as the listed providers. The bill also makes numerous references to a "complete" application. An application cannot be determined to be complete or incomplete without some standard by which to judge, which presumably would be set forth in requirements for the application and permit. However, this, too, is implied or indirect authority.

It *appears* that the application process is for small wireless facilities only, although the bill defines three other types of infrastructure:

- When the bill mentions infrastructure in substantive provisions, it is usually small wireless facilities, and the definition of "application" is a request submitted by an applicant to an authority for a permit to collocate small wireless facilities.[35]
- However, it is possible that an application could be for installation of a micro wireless facility. A micro wireless facility is a type of small wireless facility, so it could be included in the substantive provisions on small wireless facilities. Additionally, the only use of the term micro wireless facility is in a prohibition against authorities requiring approval or fees for specified activities involving micro wireless facilities,[36] which does not necessarily rule out an application for other uses of these facilities.
- The term antenna is used most often in defining the components of other infrastructure and is used only once in a substantive provision, which prohibits an authority from requiring placement of multiple antenna systems on a single utility pole.[37]
- The bill only used the term "wireless facility" in defining "small wireless facility."

Application Review and Approval

The bill establishes the following process and time requirements for the application review and approval:

- The authority must determine whether the application is complete[38] and notify the applicant by electronic mail within 10 days after receiving an application.[39] If an authority deems an application incomplete, the authority must specifically identify the missing information. The application is deemed complete when the applicant submits all documents, information, and

[34] Section 337.401(7)(d)2., F.S., as proposed by CS/SB 596.
[35] Definitions are not substantive law, so this only provides some level of guidance in interpreting the substantive provisions.
[36] Section 337.401(7)(e)3., F.S., as proposed by CS/SB 596.
[37] Section 337.401(7)(d)3., F.S., as proposed by CS/SB 596.
[38] The bill does not authorize authorities to establish requirements or standards by which completeness of an application may be determined.
[39] Ten days may be an inadequate time for a local government to make the engineering determination that a proposed location, installation, and resulting wind load comply with applicable codes.

fees specifically enumerated in the authority's permit application form or if the authority fails to provide notification to the applicant within 10 days.[40]

- If the authority fails to approve or deny a complete application within 60 days after receipt of the application, the application is deemed approved.[41]
- The authority must notify the applicant of approval or denial by electronic mail. The bill requires an authority to approve a complete application unless it does not meet the authority's applicable codes.[42] If the authority denies the application, the authority must specify in writing the basis for denial, including the specific code provisions on which the denial was based, and send the documentation to the applicant by electronic mail on the day the authority denies the application. The applicant then has 30 days after notice of the denial is sent to the applicant to cure the identified deficiencies and resubmit the application. The authority then must approve or deny the revised application within 30 days after receipt or the application will be deemed approved. Any subsequent review is limited to the deficiencies cited in the denial.[43]
- An applicant seeking to collocate small wireless facilities within the jurisdiction of a single authority may, at the applicant's discretion, file a consolidated application and receive a single permit for the collocation of multiple small wireless facilities.[44] Presumably, the above time limit requirements apply to such a consolidated application.

In reviewing an application, the authority must process applications on a nondiscriminatory basis.[45] The bill prohibits the authority from doing the following:

- Directly or indirectly requiring an applicant to perform services unrelated to the collocation for which approval is sought, such as in-kind contributions to the authority, including reserving fiber, conduit, or pole space for the authority;[46]
- Requiring an applicant to provide more information to obtain a permit than is required of electric service providers and other communications service providers that are not wireless service providers;[47]
- Requiring the placement of small wireless facilities on any specific utility pole or category of poles or requiring multiple antenna systems on a single utility pole;[48]
- Limit the placement of small wireless facilities by minimum separation distances or a maximum height limitation; however, an authority may limit the height of a small wireless facility to no more than 10 feet above the tallest existing utility pole, measured from grade in place within 500 feet of the proposed location of the small wireless facility. If there is no utility pole within 500 feet, the authority may limit the height of the small wireless facility to no more than 60 feet. The height limitations do not apply to the placement of any small

[40] Section 337.401(7)(d)5., F.S., as proposed by CS/SB 596.
[41] Section 337.401(7)(d)6., F.S., as proposed by CS/SB 596.
[42] The term "applicable codes" is defined to include "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 threats of destruction of property or injury to persons." This excludes consideration and application of zoning, land use, and aesthetic ordinances and of any other source of public safety protections.
[43] Section 337.401(7)(d)7., F.S., as proposed by CS/SB 596.
[44] Section 337.401(7)(d)8., F.S., as proposed by CS/SB 596.
[45] Section 337.401(7)(d)6., F.S., as proposed by CS/SB 596.
[46] Section 337.401(7)(d)1., F.S., as proposed by CS/SB 596.
[47] Section 337.401(7)(d)2., F.S., as proposed by CS/SB 596.
[48] Section 337.401(7)(d)3., F.S., as proposed by CS/SB 596.

wireless facility on a utility pole or wireless support structure constructed on or before June 30, 2017, if the small wireless facility does not extend more than 10 feet above the structure:[49] and
- Enter into an exclusive arrangement with any person for the right to attach equipment to authority utility poles.[50]

The bill prohibits requiring either approval or fees for:
- Routine maintenance;
- Replacement of existing wireless facilities with wireless facilities that are substantially similar or the same size or smaller; or
- Installation, placement, maintenance, or replacement of micro wireless facilities that are suspended on cables strung between existing utility poles in compliance with applicable codes by a communications service provider authorized to occupy the rights-of-way and who is remitting taxes under chapter 202, F.S.[51]

Fees

The bill addresses two types of fees. The first is an application or permit fee. The bill provides that an authority may charge a permit fee only in accordance with existing subsection (3) on fees for access to rights-of-way.[52] That subsection allows local governments to choose whether to charge permit fees. The local government can choose to require and collect permit fees from any providers of communications services that use or occupy municipal or county roads or rights-of-way, in which case the rate of the local communications services tax imposed by such jurisdiction, as computed under s. 202.20, F.S., shall automatically be reduced by a rate of 0.12 percent. Alternatively, the local government can elect not to require and collect permit fees in which case the rate for the local communications services tax as computed under s. 202.20, F.S., for that jurisdiction may be increased by ordinance or resolution by an amount not to exceed a rate of 0.12 percent.

The second type of fee is a pole attachment fee, or collocation fee, which includes any costs of make-ready work.[53] The rates and fees for collocations on authority utility poles must be nondiscriminatory, regardless of the services provided by the collocating person. The rate to collocate equipment on authority utility poles may not exceed the lesser of the annual recurring rate that would be permitted under rules adopted by the FCC under 47 U.S.C. s. 224(d) if the collocation rate were regulated by the FCC or $15 per year per authority utility pole.[54]

[49] Section 337.401(7)(d)4., F.S., as proposed by CS/SB 596.
[50] Section 337.401(7)(f)1., F.S., as proposed by CS/SB 596.
[51] Section 337.401(7)(e), F.S., as proposed by CS/SB 596.
[52] Section 337.401(7)(d), F.S., as proposed by CS/SB 596.
[53] "Make-ready" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, Order on Reconsideration, 14 FCC Rcd 18049, 18056 n.50 (1999) (Local Competition Reconsideration Order). https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-50A1.pdf (Last accessed March 2, 2017).
[54] Section 337.401(7)(f)3., F.S., as proposed by CS/SB 596.

If the authority has an existing pole attachment rate, fee, or other term that does not comply with this subsection, the authority must, no later than January 1, 2018, revise the rate, fee, or term to comply with this subsection.

Persons owning or controlling authority utility poles must offer rates, fees, and other terms that comply with this subsection. By the later of January 1, 2018, or 3 months after receiving a request to collocate its first small wireless facility on a utility pole owned or controlled by an authority, the person owning or controlling the authority utility pole must make available, through ordinance or otherwise, rates, fees, and terms for the collocation of small wireless facilities on the authority utility pole which comply with this subsection.

The rates, fees, and terms must be nondiscriminatory, competitively neutral, and commercially reasonable and must comply with this subsection.

The bill provides procedures and timelines for make-ready work:

- If the authority utility pole supports aerial facilities used to provide communications services or electric service, the parties must comply with the process for make-ready work under 47 U.S.C. s. 224[55] and implementing regulations.[56] The good faith estimate of the person

[55] Under this law, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way. https://www.law.cornell.edu/uscode/text/47/224 (Last accessed March 2, 2017.)

[56] A utility that has received a complete application for pole attachment from a cable operator or telecommunications carrier must respond within 45 days of receipt of the application (or within 60 days, in the case of larger orders, defined as orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state). This response may be a notification that the utility has completed a survey of poles for which access has been requested. A complete application is an application that provides the utility with the information necessary under its procedures to begin to survey the poles. If the request for attachment is not denied, the utility must present an estimate of charges to perform all necessary make-ready work within 14 days of providing the response. A utility may withdraw an outstanding estimate of charges to perform make-ready work within 14 days after the estimate is presented. A cable operator or telecommunications carrier may accept a valid estimate and make payment anytime after receipt of an estimate but before the estimate is withdrawn.
Upon receipt of payment of the estimate, the utility must immediately provide written notice to all known entities with existing attachments that may be affected by the make-ready:

- For attachments in the communications space, the utility must complete all make-ready work no later than 60 days after notification is sent (or 105 days in the case of larger orders). If the utility has not completed the make-ready work by within this time, the cable operator or telecommunications carrier requesting access may complete the specified make-ready.
- For wireless attachments above the communications space, the utility must complete all make-ready work no later than 90 days after notification is sent (or 135 days in the case of larger orders). The utility must complete the make-ready work by this date.

A utility may deviate from the time limits specified in this section:

- Before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.
- During performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete the make-ready work within the prescribed time frame. A utility that so deviates shall immediately notify, in writing, the cable operator or telecommunications carrier requesting attachment and other affected entities with existing attachments, and shall include the reason for and date and duration of the deviation. The utility shall deviate from the time limits specified in this section for a period no longer than necessary and shall resume make-ready performance without discrimination when it returns to routine operations.

owning or controlling the pole for any make-ready work necessary to enable the pole to support the requested collocation must include pole replacement if necessary.

- If the authority utility pole does not support aerial facilities used to provide communications services or electric service, the authority must provide a good faith estimate for any make-ready work necessary to enable the pole to support the requested collocation, including necessary pole replacement, within 60 days after receipt of a complete application. Make-ready work, including any pole replacement, must be completed within 60 days after written acceptance of the good faith estimate by the applicant.
- The authority may not require more make-ready work than is required to meet applicable codes or industry standards. Fees for make-ready work may not include costs related to preexisting damage or prior noncompliance. Fees for make-ready work, including any pole replacement, may not exceed actual costs or the amount charged to communications service providers other than wireless service providers for similar work and may not include any consultant fees or expenses.

For many local government authorities, the technology, pole attachments, and siting process contemplated in the bill are relatively new, and it may take time and experience to determine what is necessary to support the wireless infrastructure safely. Consequently, initial implementation of the bill may require consultants to obtain reasonable assurances of public safety. However, the bill prohibits recovery of any consultant fees or expenses.[57]

The bill provides that it does not authorize a person to collocate small wireless facilities on a privately owned utility pole, a utility pole owned by an electric cooperative, a privately owned wireless support structure, or other private property without the consent of the property owner.

The bill provides that the new subsection may not be construed to limit local governments' authority to enforce historic preservation zoning regulations consistent with the preservation of local zoning authority under 47 U.S.C s. 332(c)(7), the requirements for facility modifications under 47 U.S.C. s.1455(a), or the National Historic Preservation Act of 1966, as amended, and the regulations adopted to implement these laws.

The bill takes effect July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Subsection (b) of section 18, Article VII of the Florida Constitution, provides that except upon the approval of each house of the Legislature by a two-thirds vote of the membership, the Legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would be to reduce the authority that municipalities or counties have to raise revenue in the aggregate, as such authority existed on February 1,

47 CFR § 1.1420 - Timeline for access to utility poles. https://www.law.cornell.edu/cfr/text/47/1.1420 (Last accessed March 2, 2017).

[57] Section 337.401(7)(f)5.d., F.S., as proposed by CS/SB 596.

1989. However, the mandate requirements do not apply to laws having an insignificant impact, which for Fiscal Year 2016-2017 was $2 million or less.[58,59,60]

The county/municipality mandates provision of section 18, Article VII of the Florida Constitution, may apply because this bill prohibits governmental entities with authority over public roads and rights-of-way from recovering any consultant fees or expenses relating to preparing a pole for use by a wireless provider. Given the novelty of the infrastructure, pole attachments, and potential risks of liability, local government authorities may need to make frequent use of consultants to ensure public safety, and the bill prohibits recovery of these consultant costs. The Revenue Estimating Conference has not examined the fiscal impact of this bill, however, the bill's impact may exceed the $2 million threshold.

The bill does not appear to qualify under any exemption or exception. If the bill does qualify as a mandate, final passage must be approved by two-thirds of the membership of each house of the Legislature.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

According to information provided by opponents of the bill, currently the amount of the pole attachment fee is subject only to market forces, and some authorities are charging considerable more than the bill's maximum of $15.00 dollars per attachment per year; the Jacksonville Electric Authority's Small Cell Site Rental Schedule, for example, shows a charge of $1,236.00 per year for each small cell site.

B. Private Sector Impact:

Wireless providers should be able to provide better service to customers.

[58] FLA. CONST. art. VII, s. 18(d).
[59] An insignificant fiscal impact is the amount not greater than the average statewide population for the applicable fiscal year times $0.10. *See* Florida Senate Committee on Community Affairs, *Interim Report 2012-115: Insignificant Impact*, (Sept. 2011), *available at* http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-115ca.pdf (last visited Feb. 13, 2017).
[60] Based on the Demographic Estimating Conference's population adopted on November 1, 2016. The conference packet is *available at* http://edr.state.fl.us/Content/conferences/population/ConferenceResults.pdf (last visited Feb. 13, 2017).

C. Government Sector Impact:

Authorities may have difficulty and expenses in early implementation as the technology and installations involved are new uses of rights-of-way and the process includes engineering determinations of wind load, structural integrity, and safety.

The bill may conflict with the requirements of s. 365.172(12)(f), F.S., that provides the DOT the ability to generate revenue via competitive leases of its right-of-way. The DOT currently receives revenue of $1.8 million from one of its competitively bid leases for space on agency owned poles it its right-of-way.[61] These DOT leasees have the exclusive contractual right to sublease to other entities, including wireless telecommunications providers. If the existing agreements are terminated or rendered void if the bill passes, the DOT will no longer collect $1.8 million in revenue for the 2018-2019 fiscal year and approximately that amount for each subsequent fiscal year.[62] Under the bill, it appears that these leases would lose their exclusivity.[63] The issue of impairment of contract might result in litigation for these leases.

The DOT also notes that the operational and technological impacts of the bill will have significant fiscal ramifications, including roadway safety, maintenance and operation, pole or free standing structure maintenance, and fee restrictions.[64]

According to DOT, its toll roads utilize various radio frequency (RF) based technologies that are central to tolling operations.[65] The bill does not authorize the DOT to require the wireless telecommunications facilities located on DOT right-of ways be compatible with or not interfere with current and future RF technology used on DOT right-of-ways. Unplanned interruptions of revenue generating activities of Turnpike facilities granted by the bill may violate Turnpike bond covenants.[66]

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill does not address any responsibility or liability of wireless providers relating to potential personal injury or property damage.

VIII. Statutes Affected:

This bill substantially amends section 337.401 of the Florida Statutes.

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[61] *See* Florida Department of Transportation, SB 596 Legislative Bill Analysis (Jan. 30, 2017)(Copy on file with the Governmental Oversight and Accountability Committee*)*.
[62] *Id*.
[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] *Id*.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Communications, Energy, and Public Utilities on March 7, 2017:

- Amends the definition of "applicable codes" to include qualifying local government historic preservation zoning regulations,
- Amends the definition of "authority utility pole" to exclude a utility pole owned by a municipal electric company,
- Excludes from the definition of "wireless facility" wireline backhaul facilities and 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,
- Makes the prohibition against an authority requiring approval or fees relating to micro wireless facilities that are suspended applicable to facilities suspended from any type of cable, not just "messenger" cables,
- Provides that the new subsection does not authorize collocation of small wireless facilities on a utility pole owned by an electric cooperative, and
- Provides that the new subsection may not be construed to limit local government's authority to qualifying enforce historic preservation zoning regulations.

B. Amendments:

None.