HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 305 CS Wireless Emergency Telephone System
SPONSOR(S): Littlefield
TIED BILLS: **IDEN./SIM. BILLS:** SB 620

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Utilities & Telecommunications Committee	11 Y, 0 N, w/CS	Cater	Bohannon
2) Local Government Council		Camechis	Hamby
3) State Administration Appropriations Committee			
4) Commerce Council			
5)			

SUMMARY ANALYSIS

This bill is a comprehensive revision of the "Wireless Emergency Communication Act," which governs construction, placement, and modification of wireless commutations equipment, including the collocation of equipment on existing structures and towers. Currently, any antennae and related equipment to service the antennae that is being collocated on an "existing above-ground structure" is not subject to land development regulation provided the height of the existing structure is not increased. However, construction of the antennae and related equipment is subject to local building regulations and any existing permits or agreements for such property, buildings, or structures. The bill modifies existing provisions governing the collocation of wireless facilities and categorizes collocations into three types: collocations on existing towers, including nonconforming towers, which meet specified conditions; collocation on existing structures other than existing towers, including nonconforming structures, which meet specified conditions; and all other collocations. Collocations of the first two types are subject only to building permit review and are not subject to any land development regulations that are more restrictive than those in effect at the time of the initial antennae placement or to any other portion of land development regulations, or to public hearing or pubic input review. If a collocation does not meet certain requirements specified in the bill, a local government may review the collocation application under the local government's regulations, including land development regulations. The owner of an existing tower is responsible for complying with land development requirements effective when the tower was initially permitted. Existing towers, including nonconforming towers, may be modified to allow collocation or may be replaced through no more than administrative review, with no public hearing or public input review, under certain conditions. [See "Comments" on page 15 for additional information regarding public hearings.]

In reviewing an application for the construction, placement, or modification of a wireless communications facility, local governments may not require information on or evaluate a provider's designed service unless the information is directly related to an identified land development or zoning issue, or unless the provider volunteers the information. Setback or distance separation required of a tower may not exceed the minimum distance necessary, as defined by the local government, to satisfy the structural safety or aesthetic concerns protected by the setback or distance separation. The bill provides for placement of wireless communications facilities in residential areas or zoning districts and allows a local government to exclude placement of facilities in residential areas only in a manner that does not constitute an actual and effective prohibition of the provider's designed service in that area.

The bill also: deletes the requirement for an annual audit of the Wireless Emergency Telephone System Fund by the Auditor General; requires counties to establish a separate fund for moneys received from E911 Fee revenues; allows the Wireless 911 Board to use certain E911 Fee revenues to provide grants and loans to certain counties; allows the Board to hire an executive director and independent private counsel; authorizes local governments to charge reasonable application review fees; revises procedures regarding submission of applications and timeframes for local government review; and, requires expedited judicial consideration of appeals regarding the regulation of wireless communications facilities.

The bill is not expected to have a fiscal impact on state government, while the fiscal impact of the bill on local governments is indeterminate. Private wireless providers should experience a reduction in the cost of obtaining a permit for the collocation of wireless facilities. Certain counties may receive grants and loans as provided in the bill.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: The bill defines local government authority to review certain applications for the placement, construction, or modification of wireless communications facilities. The bill also deletes the requirement for an annual audit by the Auditor General of the Wireless Emergency Telephone System Fund, and requires counties to establish a separate fund for E911 Fee revenues.

Maintain Public Security: The bill is intended to facilitate the implementation of wireless E911, which will eventually allow cellular telephone users throughout the state to reach emergency services, and for emergency services to ascertain the location of callers.

Ensure Lower Taxes: The bill requires fees imposed by local governments during the review of applications for the placement of wireless communications facilities to be "reasonable".

B. EFFECT OF PROPOSED CHANGES:

BACKGROUND

Federal Rules
The Federal Communications Commission (FCC) has established rules concerning 911 services from wireless providers.[1] The FCC has established a two-phase program for enhanced 911 (E911) services from wireless phones. The phases are as follows:

> Phase I-Within six months of a request, a wireless provider must be able to provide the Public Safety Answering Point (PSAP) with the telephone number of the call originator and the location of the cell site or base station receiving the call from a mobile handset.[2]
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> Phase II-Requires wireless providers to provide location information within 50 to 300 meters, depending on the technology being used. The FCC has set December 31, 2005, as the nationwide completion date for Phase II wireless E911 service.[3]

Florida Statutory History
In 1999, the Legislature created s.365.172, F.S., known as the Wireless Emergency Communications Act[4] (Act) to address issues pertaining to wireless communications and the 911 system. The Act created the Wireless E911 Board (Board) to administer the wireless E911 fees that are established in the Act.

Additionally, the 1999 Legislature created the Wireless Emergency Telephone System Fund (Fund) in s. 365.173, F.S.[5] to administer the revenues and distribution of monies collected pursuant to s. 365.172, F.S. This statute provided a breakdown as to how the monies should be distributed and allowed counties to carry forward, for up to three successive calendar years, up to 30 percent of the funds disbursed for that county for capital outlay, capital improvements, or equipment replacements. This statute required the Auditor General to annually audit the fund.

In 2003, s. 365.172, F.S. was amended.[6] Language was added regarding the collection of the fee from prepaid wireless customers. The statute gave the Board the authority to: 1) provide technical

[1] See generally, s. 47 C.F.R. 28.18
[2] 47 C.F.R. s. 20.18(d)
[3] 47 C.F.R. s. 20.18(g)(1)
[4] Ch. 99-367, L.O.F.
[5] Ch. 99-203, L.O.F.
[6] Ch. 2003-182, L.O.F.

assistance concerning the deployment of the 911 system, 2) provide for educational opportunities related to 911 issues for the 911 community, 3) be an advocate for 911 issues, and 4) to work cooperatively with the system director to enhance 911 services and provide unified leadership on 911 issues.

Additionally, the 2003 law created s. 365.174(11), F.S., concerning the facilitation of wireless E911 service implementation. The law:

- Encourages collocation among wireless providers by making the collocation of wireless facilities exempt from land development regulations pursuant to s. 163.3203, F.S., provided that the height of the structure does not increase. Construction of the facility is still subject to existing permits and local building regulations.
- Prohibits local governments from requiring wireless providers to provide evidence of compliance with federal regulations, except for FCC licensure. The local government may request that the FCC provide information as to the provider's compliance with federal regulations, as authorized by federal law.
- Requires a local government to grant or deny a properly completed application for the collocation of wireless facilities within 45 business days, provided that the application complies with local zoning ordinances, land and building regulations, including aesthetic requirements.
- Requires a local government to grant or deny a properly completed application for a new wireless facility within 90 business days, and requires the permit to comply with federal, local, land, and building regulations, including aesthetic requirements.
- Requires local governments to notify applicants as to whether or not their application was properly submitted within 20 business days. Such determination shall not be deemed as an approval of the application, however, the notification shall indicate with specificity any deficiencies which, if cured, shall make the application properly completed.
- Deems approved properly completed applications that are not timely granted or denied, but provides for an extension to the next regularly scheduled meeting if local government procedures require action by its governing body.
- Provides that, for the waiver of a timeframe to be effective, it must be voluntarily agreed to by the applicant and the local government; except that a one time waiver may be required in the event of a declared emergency that directly affects the administration of all permitting activities of the local government.
- Provides that any additional facilities required at a secured equipment compound to meet federal Phase II E911 requirements are deemed a permitted use or activity, but local land development and building regulations apply, including aesthetic requirements.
- Requires the Department of Management Services (DMS) to negotiate leases for wireless communications facilities to be placed on state-owned property not acquired for transportation purposes and for the Department of Transportation (DOT) to negotiate leases for wireless communications facilities to be placed on state owned rights-of-way.
- Requires wireless providers to report to the Board by September 1, 2003, any unreasonable delays experienced within counties or municipalities and the applicable county or municipality. It allows the Board to establish a subcommittee, consisting of representatives from the wireless industry, cities, and counties, in order to institute a balance between the provider's responsibilities and county or municipal zoning and land use requirements.
- Requires the subcommittee to develop recommendations for the Board and municipalities and counties to consider for complying with federal Phase II E911 requirements. The recommendations were to be included in the Board's annual report to the Governor and Legislature which was filed on February 27, 2004.

February 2004, Wireless E911 Board Annual Report[7]

The 2003 legislature enacted legislation requiring the Wireless 911 Board to form a Subcommittee if it received any industry reports of "unreasonable delay" within a county or municipality by September 1, 2003.[8] Prior to September 1, 2003, the Board received 19 reports from the wireless telecommunications industry regarding 9 counties, 9 municipalities, and 1 state park[9]. Based on the legislation, the Subcommittee was created and "…responsible for developing a balanced approach between the ability of providers to locate wireless facilities necessary to comply with federal Phase II E911 requirements using the carrier's own network and the desire of counties and municipalities to zone and regulate land uses to achieve public welfare goals." The subcommittee was charged with "developing recommendations for the board and any specifically identified municipality or county to consider regarding actions to be taken for compliance for federal Phase II E911 requirements."

According to the Board's Initial Annual Report issued on February 27, 2004, the Subcommittee determined that "many of the reports [from the telecommunications industry] lacked sufficient details to understand the nature of the claimed 'unreasonable delays' and requested supplemental information be provided by the industry by October 15, 2003."

Based on the 19 reports and supplemental reports, local jurisdiction responses and the mini-hearings conducted by the Subcommittee, the Subcommittee found that

> [N]o consistent pattern or single issue was determined to indicate a uniform statewide problem causing "unreasonable delays" for the implementation of telecommunications facilities to meet federal Phase II E911 requirements. Some local jurisdictions do have issues that need to be addressed between the industry and local jurisdiction.
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> An overwhelming majority of the local jurisdictions wanted to work with the wireless telecommunications industry to help them gain the locations they needed to provide wireless E911. The local jurisdictions want wireless E911 as much as anyone else does. The public safety of their citizens is at stake. The local jurisdictions are willing to balance the need for wireless E911 with their duty to regulate land use—they need more input from the industry to make them aware of the wireless telecommunications industry requirements.

In addition, the Board's 2003 and 2004 Initial Report stated that "the primary factors delaying implementation of Phase I and II wireless enhanced 911 service in Florida is the need for funding to purchase equipment, mapping systems, etc. and resources (people) to coordinate the projects."[10]

EFFECT OF PROPOSED CHANGES

Section 1. -- Auditor General Duties [See Lines 63-136, 1086-1089]
Pursuant to s. 365.172, F.S., wireless providers are required to collect a 50 cents monthly fee (E911 fee) for each wireless telephone number that has a billing address in the state. Proceeds from the E911 fee are deposited into the Wireless Emergency Telephone System Fund (Fund), which is audited on an annual basis by the Auditor General of Florida. In 2003, E911 Fee revenues totaled approximately $49 million, and in 2004 revenues totaled approximately $61 million. Monies in the Fund are disbursed to local governments according to a statutory disbursement schedule to pay the costs of installing and operating wireless 911 systems and to reimburse wireless providers for costs incurred to provide 911 or E911 services. The Wireless 911 Board (Board) administers the E911 Fee and the

[7] *Wireless 911 Board Initial Report*, February 27, 2004.
[8] Ch. 2003-182, L.O.F.
[9] The reports were for nine counties (Alachua, Collier, Flagler, Jackson, Lee, Liberty, Miami-Dade, Pasco, and Sarasota), nine municipalities (Anna Maria, Deltona, Jacksonville, Key West, Lake Mary, Ormond Beach, Quincy, Sarasota, and Tarpon Springs), and one state park (Butler Beach).
[10] *Wireless 911 Board Initial Report*, February 28, 2005.

Fund. Section 365.173(2), F.S., provides a disbursement schedule applicable to monies in the Fund, with 44% ($24 million in 2004) distributed to counties and 54% ($33 million in 2004) distributed to providers.

The bill amends s. 11.45(2)(e), F.S., to delete from the Auditor General's duties a requirement to perform an annual audit of the Fund. The bill also deletes s. 365.173(5), F.S., which requires the Auditor General to perform an annual audit of the Fund to ensure that moneys are being managed in accordance with the law.

In Report No. 03-085, the Auditor General recommended the discontinuation of this audit for the following reasons: (1) The Fund is considered for inclusion in an operational audit at least every two years; (2) The Fund is included in the State's annual financial audit and is covered by the Florida Single Audit Act; and (3) the Fund's activities are annually reported to specified State officials.

Section 2. -- Regulatory Assessment Fees [See Lines 137-177]
The bill amends s. 364.02, F.S., to address a "glitch" in the 2003 rate-rebalancing bill that allows the Florida Public Service Commission (PSC) to impose a regulatory assessment fee on wireless providers. Commercial mobile radio service providers are not subject to regulatory assessment fees and have not been assessed the fee by the PSC.

Section 3. -- 911 Fees [See Lines 178-316]
Section 365.171, F.S., allows counties to impose a "911" fee paid by local exchange subscribers within the boundaries serviced by the "911" service if approved by referendum of the voters. Proceeds from the "911" fee must be used only for "911" expenditures.

The bill amends s. 365.171(13)(a)6., F.S., to delete obsolete language relating to a pilot project that ended June 30, 2003, and the bill removes nonemergency 311 systems and similar nonemergency systems as expenses for which 911 fees may be used. This change addresses a concern that Florida might be considered ineligible to receive federal 911 grant revenue due to the expenditure of 911 funds for nonemergency purposes.

Section 4. – Wireless Emergency Communications Act
The bill substantially amends s. 365.172, F.S., which is the "Wireless Emergency Communications Act" (Act). Generally speaking, the bill creates new definitions of terms; creates standards applicable to the placement, construction, and modification of applications for wireless communications facilities; modifies procedures applicable to local government review of the collocation of wireless facilities; provides for placement and construction of wireless facilities in residential areas; and, specifies local governments' ability to impose reasonable fees for application reviews.

Definitions: Subsection 365.172(3), F.S. is amended to define previously undefined terms and clarify existing definitions. The definitions are applied only to the Act, s. 365.173, (Wireless Emergency Telephone System Fund), and s. 365.174, F.S., (proprietary confidential business information). The newly defined terms are found on lines 317-473 of the bill and are as follows:

- Building-permit review: A review for compliance with building construction standards adopted by the local government under ch. 553, F.S. and does not include a review for compliance with land development regulations.
- Collocation: The situation when a second or subsequent wireless provider uses an existing structure to locate second or subsequent antennae. The term includes the ground, platform, or roof installation of equipment enclosures, cabinets, or buildings, and cables, brackets, and other equipment associated with the location and operation of the antennae.
- Designated service: The configuration and manner of deployment of service the wireless provider has designed for an area as part of the network.
- Existing structure: A structure that exists at the time an application for permission to place antennae on a structure is filed with a local government. The term includes any structure that can structurally support the attachment of antennae in compliance with applicable codes.

- Historic building, structure, site, object or district: Any building, structure, site, object, or district that has been officially designated as a historic building, historic structure, historic site, historic object, or historic district through a federal, state, or local designation program.
- Land development regulations: Any ordinance enacted by a local government for the regulation of any aspect of the development, including an ordinance governing zoning, subdivisions, landscaping, tree protection, or signs, the local government's comprehensive plan, or any other ordinance concerning any aspect of the development of land. The term does not include any building-construction standard adopted under and in compliance with ch. 553, F.S. (building construction).
- Medium County: Any county that has a population of 75,000 or more but less than 750,000.
- Office: State Technology Office
- Provider or wireless provider: A person or entity who provides service and either: 1) is subject to the requirements of the order (as defined in this section); or 2) elects to provide wireless 911 or E911 service in this state.
- Tower: Any structure designed primarily to support a wireless provider's antennae.
- Wireless communications facility: Any equipment or facility used to provide service, and may include, but is not limited to antennae, towers, equipment enclosures, cabling, antenna brackets, and other such equipment. Placing a wireless communications facility on an existing structure does not cause an existing structure to become a wireless communications facility.

Authority of Wireless 911 Board (Board): Section 365.172(6), F.S., requires the Board to review and oversee the disbursement of E911 fee revenues deposited into the Wireless Emergency Telephone System Fund (Fund) and authorizes the Board to prioritize disbursements from the Fund to wireless providers and rural counties in order to implement E911 services in the most efficient and cost-effective manner.

This bill amends s. 365.172(6), F.S., to authorize the Board's use of certain revenues collected from the E911 fee and deposited into the Fund for the purpose of providing grants to rural counties and loans to medium counties to upgrade E911 systems. Grants provided by the Board to rural counties are in addition to disbursements provided under s. 365.173(2)(c), F.S., which requires 2% (or other percentage as determined by the Board) of moneys in the Fund to be distributed to rural counties on a monthly basis. Loans provided to medium counties must be based on county hardship criteria as determined and approved by the Board.

The bill further provides that revenues distributed to medium counties must be fully repaid in the manner and timeframe as determined and approved by the Board. The Board must take all actions within its authority to ensure that county recipients of grants and loans use the funds only for the purpose for which they were provided. Moreover, if the Board determines that a county used these funds in a manner that is contrary to the intended purposes, the Board may take any action within its authority to secure repayment of the grant or loan.

Lastly, the Board is authorized to hire a qualified independent executive director and to procure the services of a private, independent attorney via invitation to bid, request for proposals, invitation to negotiate, or professional contracts for legal services already established. Currently, the State Technology Office performs the administrative functions of the Board and the Attorney General's Office provides legal counsel. [See Lines 474-595]

Wireless E911 Fee: Section 365.172, (8)(a), F.S., requires each home service provider to collect a monthly fee (E911 Fee) imposed on each "customer" whose place of primary use is within this state. The monthly E911 Fee is 50 cents per service line. This bill amends s. 365.172(8), F.S., to clarify that state and local governments are not "customers" subject to the E911 fee. This revision is consistent with Attorney General Opinion 87-29.

Currently, s. 365.173, F.S., authorizes the Board to adjust the allocation percentages provided in s. 365.173, F.S., or reduce the E911 Fee, or both, if necessary to ensure full cost recovery or prevent over-recovery of costs incurred in the provision of E911 service. However, any new allocation

percentages or reduced fee may not be adjusted for 2 years. This bill amends s. 365.172(8), F.S., to allow for annual adjustment by the Board. [See Lines 596-612]

Facilitating E911 Service Implementation: This bill substantially amends s. 365.172(11), F.S., to provide standards for and facilitate the placement, construction and modification of wireless facilities, including construction and placement of "wireless communications facilities" in residential areas and collocation of wireless equipment on existing towers and structures.

The bill provides that, in order to balance the public need for reliable E911 services through reliable wireless systems and the public interest served by governmental zoning and land development regulations, and notwithstanding any other law or local ordinance to the contrary, the standards set forth in the bill apply to a local government's actions, as a regulatory body, in the regulation of the placement, construction, or modification of a wireless communications facility. A "local government" is defined as a municipality or county, or agency thereof, but does not include an airport even if owned or controlled by a local government.

The standards do not apply to local governments when they are acting in their role as property owners; however, in the use of the property they own, local governments may not use their regulatory powers to avoid compliance with, or in a manner that does not advance, this subsection. [See Lines 613-636]

Collocation of Wireless Facilities [See Lines 637-765]

Section 365.172(11)(a), F.S., (Act), currently addresses the collocation of wireless equipment and provides that, notwithstanding any other law or local ordinance to the contrary, any antennae and related equipment to service the antennae that is being collocated on an existing above-ground structure is not subject to land development regulations provided the height of the existing structure is not increased. However, construction of the antennae and related equipment is subject to local building regulations and any existing permits or agreements for the property, buildings, or structures. The permitholder for or owner of the existing structure must comply with any applicable condition or requirement of a permit, agreement, or land development regulation, including any aesthetic requirements, or law. The term "collocation" is not defined in current law.

The bill defines "collocation" as "the situation when a second or subsequent wireless provider uses an existing structure to locate a second or subsequent antennae. The term includes the ground, platform, or roof installation of equipment enclosures, cabinets, or buildings, and cables, brackets, and other equipment associated with the location and operation of the antennae." The bill does not define "nonconforming tower" or "nonconforming structure"; however, it appears these terms refer to towers and structures that do not meet current regulations imposed by local governments, including zoning or land development regulations.

Notwithstanding any other law or local ordinance to the contrary, the bill creates new provisions regarding collocation, separating collocation into three types and establishing review standards for each type as follows:

Type 1. Collocations on existing towers, including nonconforming towers, which meet specified conditions. [See Lines 648-677]

Collocation on towers, including nonconforming towers, which comply with the following requirements are subject to a building permit review only and are not subject to any land development regulation, design or placement requirements that are more restrictive than those in effect at the time of the initial antenna(e) placement, or to public hearing and public input review:

- The collocation does not increase the height of the tower;
- The collocation does not increase the ground space area approved in the site plan; and
- The collocation consists of antennae, equipment enclosures, and ancillary facilities that are of a design and configuration consistent with all applicable regulations, restrictions or conditions, if

any, that applied to the *initial* antennae placed on the tower and to its accompanying equipment enclosures and ancillary facilities and, if applicable, those applied to the tower supporting the antennae.

Type 2. Collocations on existing structures other than existing towers, including nonconforming structures, which meet specified conditions. [See Lines 678-710]

Collocation on all other existing structures, except for historic buildings, structures, sites, objects or districts, are subject to no more than building-permit review and an administrative review without public hearing or input, and are not subject to any portion of the local government's land development regulations that are not addressed in this provision, if the following conditions are met:

- The collocation does not increase the height of the existing structure to which the antennae are attached;
- The collocation does not increase the ground space area;
- The collocation consists of antennae, equipment enclosures, and ancillary facilities that are of a design and configuration consistent with all applicable structural or aesthetic design requirements and any requirements for location on the structure, but not prohibitions or restrictions on the placement of additional collocations on the existing structure or procedural requirements of the local government's land development regulations in effect at the time of the collocation application; and
- The collocation consists of antennae, equipment enclosures, and ancillary facilities that are of a design and configuration consistent with all applicable restrictions or conditions, if any, that do not conflict with the paragraph above *and* that applied to the *initial* antennae placed on the structure and to its accompanying equipment enclosures and ancillary facilities and, if applicable, that applied to the structure supporting the antennae.

Type 3. All other collocations

If a collocation does not qualify as a Type 1 or Type 2 collocation on an existing tower or structure, the local government may review the collocation application under the local government's regulations, including land development regulations, applicable to the placement of an initial antenna and its accompanying equipment enclosure and ancillary facilities. [See Lines 738-743] However, if only a portion of the collocation fails to meet the requirements, such as an increase in height or an expansion of ground space, only that portion is subject to the local government's review as an initial placement, including land development regulations. The portion of the collocation that satisfies the requirements for a Type 1 or Type 2 collocation may only be subjected to review consistent with the standards set forth above for those collocations. [See Lines 716-728]
The bill also includes the following general provisions regarding collocation:

- A collocation proposal that increases the ground space area that was approved in the original site plan for equipment enclosures and ancillary facilities by no more than a cumulative 400 square feet, or 50% of the original compound size, whichever is greater, may only be subject to an administrative review for compliance with local government's regulations, with no public hearing or public input review. [See Lines 728-737]

- Regulations, restrictions, conditions, or permits of the local government, acting in its regulatory capacity, that limit the number of collocations or require review processes inconsistent with this subsection do not apply to collocations that meet the requirements for existing towers or structures discussed above. [See Lines 711-715]

- If a collocation meets the requirements described above and applicable to collocation on existing towers or structures, the collocation may not be considered a modification to an existing structure or impermissible modification of a nonconforming structure. The bill also provides that the owner of the existing tower on which a collocation is to be located remains responsible for

complying with the conditions that were placed on the tower *when it was approved*, as long as those conditions do not conflict with this statute. Currently, the permitholder for or owner of the existing structure must comply with any applicable condition or requirement of a permit, agreement, or *current* land development regulation, including any aesthetic requirements, or law. [See Lines 748-757]

The bill also adds the following new provisions to the Act, which appear to relate to the construction of new wireless communications facilities, including towers, and collocations:

Modification or Replacement of Existing Towers

An existing tower, including a nonconforming tower, may be structurally modified to allow collocation *or be replaced* with no more than an administrative and building permit review, provided that the overall height is not increased and, if replaced, the replacement tower is a monopole, or if the existing tower is a camouflaged tower, the replacement tower is a like-camouflaged tower. [See Lines 758-765]

Residential Areas

Current law does not specifically address the placement of wireless facilities in residential areas. This bill provides that a local government may only exclude the placement of wireless communications facilities in residential areas or residential zoning districts in a manner that does not constitute an actual or effective prohibition of the provider's *designed service* in that area or district. If the provider demonstrates to the local government's satisfaction that the provider cannot reasonably provide its designed service to the residential area or zone from outside the area or zone, the local government and provider "shall cooperate to determine an appropriate location for a wireless communications facility of an appropriate design within the residential area or zone." An application for placement of a wireless facility in a residential area is not considered an application subject to the mandatory application review timeframes provided in s. 365.172(11)(d), F.S. The bill provides for the reimbursement of the local government by the provider of the reasonable costs of the cooperative effort. [See Lines 802-817]

Setbacks and Distance Separation for Towers

Current law does not address setbacks or distance separation required of a tower. This bill provides that any setback or distance separation required of a tower may not exceed the minimum distance needed to satisfy structural safety or aesthetic concerns that are protected by the setback distance or distance separation. The bill defines "tower" as "any structure designed primarily to support a wireless provider's antennae." [See Lines 797-801]

Application Review Process and Fees

The bill defines "wireless communications facility" as "any equipment or facility used to provide service and may include, but is not limited to, antennae, towers, equipment enclosures, cabling, antenna brackets, and other such equipment." A local government's land development and construction regulations for wireless communications facilities may only address land development or zoning issues. The local government's review of an application for the placement, construction, or modification of a wireless communications facility may only address land development or zoning issues. Therefore, the regulations or review may not require information on, or include an evaluation of, the provider's business decisions regarding its service, customer demand for its service, or quality of its service unless the provider voluntarily offers the information. A local government may not require information on or evaluate the provider's designed service unless the information is directly related to an identified land development or zoning issue, or the provider volunteers the information. [See Lines 766-796]

Current law does not address fees charged by local governments for reviewing applications to place, construct, or modify a wireless communications facility; however, fees are being charged by local

governments pursuant to local regulations. The bill authorizes a local government to impose a reasonable fee on applications to place, construct, or modify a wireless communications facility only if a similar fee is imposed on applicants seeking other similar types of zoning, land use, or building-permit review. A local government may impose fees for consultants who review applications or experts who conduct code compliance review but the fee is limited to specifically identified reasonable expenses incurred in the review. The local government may impose a reasonable surety requirement to ensure the removal of wireless communications facilities no longer being used. [See Lines 818-829]

In addition, a local government may impose design requirements, such as requirements for designing towers to support collocation or aesthetic requirements, except as otherwise limited by the Act, but may not impose or require information on compliance with building code type standards for the construction or modification of wireless communications facilities beyond those adopted by the local government under ch. 553, F.S., and that apply to all similar types of construction. [See Lines 830-837]

Currently, s. 365.172(11)(b), F.S., prohibits local governments from requiring providers to submit evidence of a wireless communications facility's compliance with federal regulations; however, local governments must receive evidence of Federal Communications Commission (FCC) licensure from a provider and may request the FCC to provide information regarding a provider's compliance with federal regulations. The bill amends that provision to allow local governments to require evidence of compliance with applicable Federal Aviation Administration requirements or evidence of FCC authorized spectrum use. [See Lines 838-849]

Collocation Application Review Timelines [See generally Lines 850-944]

Currently, s. 365.172(11)(c)1., F.S., requires local governments to grant or deny a property completed application for the collocation of a wireless communications facility on property, building, or structures within 45 business days after the date the properly completed application is initially submitted, provided that the permit complies with applicable federal regulations and applicable local zoning or land development regulations, including any aesthetic requirements. The provision specifies that local building regulations apply.

The bill amends s. 365.172(11)(c), F.S., as it relates to the three types of collocations as described in new s. 365.172(11)(a)1, F.S. [See lines 637-765 of the bill]. This provision affects collocations on existing towers, including nonconforming towers, which meet specified conditions; collocation on existing structures other than existing towers, including nonconforming structures, which meet specified conditions; and other collocations. The bill requires local governments to grant or deny applications for these collocations within the normal timeframe for a similar building-permit review but in no case later than 45 business days after the date the application is determined by the local government to be properly completed. The bill deletes the current requirement that collocation applications comply with applicable federal regulations and local zoning and land development regulations.

Application Review Timelines for Other Wireless Communications Facilities

Currently, s. 365.172(11)(c)2., F.S., requires a local government to grant or deny a properly completed application for a permit for the siting of a new wireless tower or antenna on property, buildings, or structures within the local government's jurisdiction within 90 business days after the date the properly completed application is initially submitted in accordance with the applicable local government application procedures, provided that the permit complies with applicable federal regulations and applicable local zoning or land development regulations, including any aesthetic requirements. Local building regulations apply to these applications.

The bill amends this provision to require a local government to grant or deny a properly completed application for any wireless communications facility, other than an application for collocation, within the normal timeframe for a similar type of review, but in no case later than 90 business days after the date the application is determined to be complete. The bill deletes the current requirement that collocation

applications comply with applicable federal regulations and local zoning and land development regulations.

Procedures Applicable to All Applications

Currently, a local government is required to notify the permit applicant within 20 business days after the date the application is submitted as to whether the application is, for administrative purposes only, properly completed and has been properly submitted. However, the determination is not deemed as an approval of the application. The notification must indicate with specificity any deficiencies which, if cured, will complete the application. If the local government fails to grant or deny a properly completed application for a permit which has been properly submitted within the statutory timeframes described above, the permit is automatically approved and the provider may proceed with placement of facilities without interference or penalty. The statutory timeframes are extended only to the extent that the permit has not been granted or denied because the local government's procedures generally applicable to all permits, require action by the governing body and such action has not taken place within the timeframes. Under such circumstances, the local government must act to either grant or deny the permit at its next regularly scheduled meeting or the permit is automatically approved.

To be effective, a waiver of the statutory timeframes must be voluntarily agreed to by the applicant and the local government. A local government may request, but not require, a waiver of the timeframes by an entity seeking a permit, except that, with respect to a specific permit, a one-time waiver may be required in the case of a declared local, state, or federal emergency that directly affects the administration of all permitting activities of the local government.

This bill amends these general procedures to provide that:

- An application is deemed submitted or resubmitted on the date the application is received by the local government.
- If the local government fails to notify the applicant in writing that the application is incomplete within 20 business days after the date the application is initially submitted or additional information is resubmitted, the application is deemed approved for administrative purposes only, to be properly completed and resubmitted.
- If an application is not completed in compliance with the local government's regulations, the applicant must be notified in writing and the notice must specify any deficiencies in the application which, if cured, make the application complete.
- Upon resubmission of the information to cure the deficiencies, the local government must notify the applicant, in writing, within 20 business days after the additional information is submitted of any remaining deficiencies. Deficiencies in document type or content *not* specified by the local government do not make the application incomplete.
- If the applicant does not cure a specified deficiency upon resubmission of information, the local government may continue to request the information until the deficiency is cured.
- A local government may establish reasonable timeframes within which the required information to cure an application deficiency is to be provided or the application may be considered withdrawn or closed.
- If a local government fails to grant or deny a properly completed application for a wireless communications facility within the timeframes described above, the application is automatically approved and the applicant may proceed with placement of the facilities.
- The timeframes for application review may be extended only to the extent the application has not been granted or denied because the local government's procedures generally applicable to all other similar types of applications require action by the governing body which has not taken place during the applicable timeframe. Under these circumstances, the local government must act on the application at its next regularly scheduled meeting or the application is automatically approved.

Review of Additional Wireless Facilities

Section 365.172(11)(d), F.S., states that any additional wireless communications facilities, such as communication cables, adjacent accessory structures, or adjacent accessory equipment used in the provision of cellular, enhanced specialized mobile radio, or personal communications services, required within the existing secured equipment compound within the existing site are deemed a permitted use or activity. This section applies local building and land development regulations, including any aesthetic requirements, to these facilities. The bill deletes this provision in its entirety. [See Lines 937-944]

Replacement of Existing Facilities

The bill creates a new provision, which states that the replacement of or modification to a wireless communications facility, except a tower, that results in a wireless communications facility not readily discernibly different in size, type, and appearance when viewed from ground level from surrounding properties, and the replacement or modification of equipment that is not visible from surrounding properties, all as reasonably determined by the local government, are subject to no more than applicable building-permit review. [See Lines 945-953]

Expedited Treatment of Legal Challenges

The bill creates a new provision, which states that if any person adversely affected by any action or failure to act or regulation or requirement of a local government in the review or regulation of the wireless communication facilities files an appeal or brings an appropriate action in a court or venue of competent jurisdiction, following the exhaustion of all administrative remedies, the matter must be considered on an expedited basis. [See Lines 972-978]

Deletion of Obsolete Language

Paragraph (f) of s. 365.172(11), F.S., is deleted to remove obsolete language regarding 2003 wireless provider reporting requirements and requirements applicable to the Wireless 911 Board's 2004 annual report. [See Lines 979-1005]

Section 5. -- Wireless Emergency Telephone System Fund [See Lines 1006-1089]
As previously discussed, s. 365.173, F.S., creates the Wireless Emergency Telephone Fund (Fund) and requires revenues generated by the E911 fee to be deposited into the Fund for disbursement by the Wireless 911 Board (Board) pursuant to the statutory disbursement schedule. Subject to modifications by the Board, s. 365.172(2), F.S., requires 44% of the moneys in the Fund is disbursed to counties, based on the total number of wireless subscriber billing addresses in each county, for the payment of recurring costs of providing 911 or E911 service and costs to comply with the requirements for E911 service contained in the applicable federal orders and regulations. In 2004, $24 million from the Fund was disbursed to the counties.

The bill amends s. 365.173(2), F.S., to require each county that receives money from the Fund to establish a separate fund used exclusively for the receipt and expenditure of the E911 Fee revenues disbursed to counties from the Fund. All fees placed in the county fund and any interest accrued must be used solely for the payment of recurring costs of providing 911 or E911 service and costs to comply with the requirements for E911 service contained in the applicable federal orders and regulations. The money collected and interest earned in the county fund must be appropriated for these purposes by the county commissioners and incorporated into the annual county budget. The county fund must be included within the annual financial audit performed by an independent certified public accountant under s. 218.39, F.S.

Currently, counties receiving a disbursement from the Fund may carry forward, for up to 3 successive calendar years, up to 30 percent of the total funds disbursed to the county by the Board during a calendar year for expenditures for capital outlay, capital improvements, or equipment replacement.

This bill deletes the 3-year carry forward limitation and, therefore, allows counties to carry forward funds indefinitely.

Section 6. -- Use of Right-of-Way for Utilities [See Lines 1092-1152]
Section 337.401(3)(a)1., F.S., governs the placement or maintenance of communications facilities in the public roads or rights-of-way. Rules or regulations imposed by a municipality or county relating to providers of communications services placing or maintaining communications facilities in its roads or rights-of-way must be generally applicable to all providers of communications services and, notwithstanding any other law, may not require a provider of communications services, except as related to the provision of cable service, to apply for or enter into an individual license, franchise, or other agreement with the municipality or county as a condition of placing or maintaining communications facilities in its roads or rights-of-way. In addition to other reasonable rules or regulations that a municipality or county may adopt relating to the placement or maintenance of communications facilities in its roads or rights-of-way under this subsection, a municipality or county may require a provider of communications services that places or seeks to place facilities in its roads or rights-of-way to register with the municipality or county and to provide the name of the registrant; the name, address, and telephone number of a contact person for the registrant; the number of the registrant's current certificate of authorization issued by the Florida Public Service Commission or the Federal Communications Commission; and proof of insurance or self-insuring status adequate to defend and cover claims. “Nothing in this subparagraph is intended to limit or expand any existing zoning or land use authority of a municipality or county; however, no such zoning or land use authority may require an individual license, franchise, or other agreement as prohibited by this subparagraph.”

This bill deletes the last sentence of the subparagraph. The effect, if any, of deleting this sentence is unclear.

C. SECTION DIRECTORY:

Section 1. Amends s. 11.45, F.S., to remove the requirement for an annual audit of the Wireless Emergency Management Trust Fund by the Auditor General.

Section 2. Amends s. 364.02, F.S., to remove “glitch” language relating to regulatory assessment fees.

Section 3. Amends s. 365.171, F.S., to delete obsolete language related to a pilot project and removes nonemergency systems as expenses for which 911 fees may be used.

Section 4. Amends s. 365.172, F.S., to substantially amend the provision by adding definitions, expanding the authority of the Wireless 911 Board, amending the E911 Fee provision, and substantially amending provisions concerning the placement of wireless communications facilities, including collocations.

Section 5. Amends s. 365.173, F.S., relating to the Wireless Emergency Telephone System Fund.

Section 6. Amends s. 337.401, F.S., relating to the placement or maintenance of communications facilities in the public roads or rights-of-way.

Section 7. Provides an effective date of July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: There may be some cost savings associated with removing the requirement that the Auditor General annually audit the Wireless Emergency Telephone System Fund and incorporating the audit of the Fund into other governmental audits.

2. Expenditures: The bill allows the Board to hire an Executive Director and independent outside counsel. If the Board hires an Executive Director and outside counsel, there will be expenditures associated with the Executive Director's position and the provision of legal services.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: Local governments may experience a reduction in revenue if they are currently requiring wireless providers to pay higher permit fees than required from other entities for other permit reviews. The bill also exempts local governments from paying wireless E911 fees, which may provide savings to local governments.

2. Expenditures: Counties that receive E911 Fee revenues disbursed from the Fund may incur some expense in establishing a separate account for those disbursements and incorporating that account into their annual audit.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: With fewer restrictions imposed on applications to establish wireless communications facilities or to collocate facilities, wireless providers may incur fewer costs. In addition, fees imposed by local governments for the review of applications may be reduced.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other: None.

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

City of Homestead Resolution

On March 7, 2005, the City Council of the City of Homestead adopted a resolution in opposition to HB 305 because it does "not promote the best interests of the City of Homestead, and interferes with the City's home rule powers." According to the resolution, the bill purports to "preempt the City's home rule powers, creates exemptions from the City's land development regulations and zoning codes, appears to allow unrestricted placement of cell towers in residential areas and purports to create unfounded mandates by limiting the ability of the City to recover its administrative costs." The resolution also stated that the City opposes any legislation that "preempts and prohibits local governments from examining the business need for any new facility, or the need for the placement of the tower at a specific location requested by the wireless carrier. This legislation may preempt local jurisdiction's siting hierarchies established in local zoning codes." In addition, the City opposes any legislation that "interferes with the fee, surety, and/or insurance requirements the City places on wireless carriers which as a practical matter may be greater than those imposed on 'applicants seeking similar types of zoning, land use, or building-permit review'".

Public hearings and Public Input Review

The bill specifies that certain collocation applications are subject to a limited review as follows:

> Collocations on towers, including nonconforming towers, that meet the requirements…are subject only to building-permit review….Such collocations are not subject to…*public hearing or public input review*. [See lines 648-658 for complete text.]
>
> * * *
>
> [C]ollocations on all other existing structures that meet the requirements…shall be subject to no more than building-permit review, and an administrative review for compliance….Such collocations are not subject to … *public hearing or public input review*. [See lines 678-868 for complete text.]
>
> * * *
>
> A collocation proposal…that increases the ground space area…by no more than a cumulative amount of 400 square feet or 50 percent of the original compound size, whichever is greater, shall, however, require no more than administrative review …with *no public hearing or public input review*. [See lines 716-737 for complete text.]
>
> * * *
>
> An existing tower, including a nonconforming tower, may be structurally modified to permit collocation or may be replaced through no more than administrative review, with *no public hearing or public input review*.... [See lines 758-765 for complete text.]

These provisions provide that certain collocations and modifications or replacements of existing towers are not subject to "public hearing or public input review." The terms "public hearing" and "public input review" are not defined by the bill. The bill does not specify whether it is only the initial application for a collocation, modification or replacement of a tower that is not subject to public hearing or public input review, or whether it is the entire process, including appeals. Thus, these provisions may be interpreted to preclude the entire process from public hearing or public input review, including appeals of local government decisions regarding these applications.

The Florida Statutes do not contain generally applicable definitions of the terms "public hearing" or "public input review." However, for purposes of administrative rulemaking procedures conducted by agencies subject to the Florida Administrative Procedure Act, s. 120.54(3)(e)2., F.S., defines the term "public hearing" as "any public meeting held by any agency at which the rule is considered."

Because the bill does not define "public hearing" or "public input review" for purposes of certain collocations, modification or replacement of towers, it is uncertain as to whether these terms include a "public meeting" of a collegial body of a government agency subject to the open meetings requirements of Article I, s. 24(b) of the State Constitution.

Article I, s. 24(b), Fla. Const., requires that all meetings of a collegial public body of the executive branch of state government or of local government, at which official acts are to be taken or at which the public business of such body is to be transacted or discussed, be open and noticed to the public. In addition, the Florida Supreme Court has state that "specified boards and commissions…should not be allowed to deprive the public of this inalienable right to be present and heard at all deliberations wherein decisions affecting the public are being made." *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693, 699 (Fla. 1969). And see, *City of Miami Beach v. Berns*, 245 So.2d 38, 41 (Fla. 1971) ("The evil of closed door operation of government without permitting public scrutiny and participation is what the law seeks to prohibit.")

However, the Supreme Court has indicated that, with regard to certain types of executive meetings, there may not be a right for a member of the public to participate, such as staff meetings where staff is carrying out executive functions traditionally conducted without public input. *Wood v. Marston*, 442

So.2d 934, 941 (Fla. 1983). In these situations, the Florida Attorney General has recognized that the public has the right to attend but may not have a right to participate.[11]

The Legislature is authorized to provide by general law, passed by two-thirds vote of each house, for the exemption of meetings from public meetings requirements provided such law states with specificity the public necessity justifying the exemption and is no broader than necessary to accomplish the stated purpose of the law. Article I, s. 24(c), Fla. Const. See, *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So. 2d 567 (Fla. 1999) (finding an open meetings exemption to be unconstitutional because the law did not meet the constitutional standard of specificity as to stated public necessity and limited breadth to accomplish that purpose).[12]

If this bill is construed to prohibit public meetings regarding certain collocations, modifications or replacements of a tower and a local government's policies currently require or allow public meetings with respect to these issues, the local government's policies may require revision in order to comply with this bill. If a collegial body of a local government convenes a meeting to address one of the specified collocations, a modification or replacement of a tower, and if the meeting is not conducted as a "public meeting", the meeting may be contrary to the open government provisions of s. 24, Art. I of the State Constitution.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Utilities & Telecommunications Committee provided the following description of the strike-all amendment:

On March 10, 2005, the Utilities & Telecommunications Committee adopted a strike-all amendment to the bill. This amendment was agreed upon by the wireless providers, cities, and counties. It addresses various concerns that the stakeholders had concerning the original bill. The amendment added the deletion of language concerning the use of 911 fees. It also added or clarified language concerning the following:

- Allow the wireless E911 Board to provide grants or loans to small or medium counties for purposed of upgrading E911 systems
- Clarifies and bifurcates the provisions concerning collocation
- Clarifies that the bill does not apply to local governments when they are acting as property owners
- Clarifies the provisions encouraging the collocation of antennas on towers and other structures
- Allows local governments to ban all wireless facilities in residential areas only if it is possible for a provider to still serve the area
- Further clarifies provisions relating to the modification or replacement of existing towers; local government review of business need for the service at a particular location; fees and other financial requirements on wireless facilities, including review by outside experts.

[11] *Government-in-the-Sunshine Manual*, 2004 Edition, Vol. 26, pp. 41-42. (Prepared by the Office of the Attorney General, and published by the First Amendment Foundation.)
[12] *Id.* at 46.