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BILL ANALYSIS



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Senate Bill 637 (as introduced 10-19-17)
Sponsor: Senator Joe Hune
Committee: Energy and Technology

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CONTENT

The bill would enact the "Small Wireless Communications Facilities Deployment Act" to do the following:

- Prohibit a State or local authority from entering into an exclusive agreement for use of a right-of-way (ROW) for work on utility poles or the collocation of small cell wireless facilities.
- Prohibit an authority from charging a wireless provider a rate or fee for the use of an ROW.
- Permit a wireless provider to collocate small wireless facilities and work on utility poles in, along, across, upon, and under an ROW, subject to certain height limitations.
- Allow an authority to require a wireless provider to repair any damage to an ROW directly caused by the activities of the provider while working on small cell wireless facilities or utility poles in the ROW.
- Prohibit an authority from prohibiting, regulating, or charging for the collocation of small cell wireless facilities, but allow the authority to require an application for a permit.
- Require a provider to commence collocation within one year after a permit was granted.
- Require an application and an application fee for a permit to meet certain conditions.
- Specify requirements an application for a zoning approval would have to meet.
- Require an authority to approve or deny an application and notify the applicant within 90 days if the application were for a modification for a wireless support structure or the installation of a new small cell wireless facility, or 150 days if the application were for a new wireless support structure.
- Prohibit an authority from denying an application unless there was a reasonable basis for the denial, and require a denial be supported by substantial evidence.
- Require a wireless provider to commence construction of an approved structure or facility within two years after a permit was granted, and pursue construction to completion.
- Prohibit a person who owned or controlled authority poles or utility poles for designated services from entering into an exclusive agreement with a person for the right to attach to the poles.
- Establish requirements that a rate or fee to collocate a small cell wireless facility on a pole would have to meet.
- Provide that circuit court would have jurisdiction to determine all disputes arising under the Act.

The bill would take effect 90 days after it was enacted.

Definitions

"Authority", unless the context implied otherwise, would mean each State, county, township, city, village, district, or subdivision thereof authorized by law to make legislative, quasi-judicial, or administrative decision concerning an application. The term would not include a State court having jurisdiction over an authority.

"Small cell wireless facility" would mean a wireless facility that meets both of the following requirements:

- Each antenna that is located inside an enclosure of not more than six cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements would fit within an imaginary enclosure of not more than six cubic feet.
- All other wireless equipment associated with the facility is cumulatively not more than 28 cubic feet in volume.

(The following types of associated ancillary equipment would not be 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, and vertical cable runs for the connection of power and other services.)

"Collocate" or "collocation" would mean to install, mount, maintain, modify, operate, or replace wireless facilities on or adjacent to a wireless support structure or utility pole.

"Right-of-way" or "ROW" would mean the area on, below, or above a public roadway, highway, street, alley, easement, waterway, sidewalk, or similar property. The term would not include a Federal interstate highway.

"Wireless facility" would mean equipment at a fixed location that enables the provision of wireless services between user equipment and a communications network, including radio transceivers, antenna, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration. It also would include a small cell wireless facility. The term would not include any of the following:

- The structure or improvements on, under, or within which the equipment is collocated.
- A wireline backhaul facility (a facility used to transport services by wire from a wireless facility to a network).
- Coaxial or fiber-optic cable between utility poles or wireless support structures or that otherwise is not immediately adjacent to or directly associated with a particular antenna.

"Wireless services" would mean any services, provided using licensed or unlicensed spectrum, including the use of wi-fi, whether at a fixed location or mobile.

"Wireless provider" would mean a wireless infrastructure provider or a wireless services provider.

"Wireless infrastructure provider" would mean any person, including a person authorized to provide telecommunications service in the State but not including a wireless service provider, that builds or installs wireless communication transmission equipment, wireless facilities, or wireless support structures.

"Wireless support structure" would mean a freestanding structure, such as a monopole; tower, either guyed or self-supporting; billboard; or other existing or proposed structure designed to support or capable of supporting small cell wireless facilities. It would not include a utility pole.

Purpose of the Act

The stated purpose of the proposed Act would be to do all of the following:

- "Increase investment in wireless networks that will benefit the citizens of the state by providing better access to emergency services, advanced technology, and information."
- "Increase investment in wireless networks that will enhance the competitiveness of the state in the global economy."
- "Encourage the deployment of advanced wireless services by streamlining the process for the permitting, construction, modification, maintenance, and operation of wireless facilities in the public rights-of-way."
- "Allow wireless services providers and wireless infrastructure providers access to the public rights-of-way and the ability to attach to poles and structures in the public rights-of-way to enhance their networks and provide next generation services."
- "Ensure the reasonable and fair control and management of public rights-of-way by governmental units within the state."
- "Address the timely design, engineering, permitting, construction, modification, maintenance, and operation of wireless facilities as matters of statewide concern and interest."
- "Provide for the management of public rights-of-way in a manner that..." supports new technology; avoids interference with right-of-way use by existing public utilities and cable communications providers; and ensures a level playing field for competitive communications service providers.

"Communications service provider" would mean any entity that provides communications service. "Communications service" would mean service provided over a communications facility, including cable service, as defined in 47 U.S.C. 522(6) (the one-way transmission to subscribers of video programming and other programming service, and subscriber interaction, if any, which is required for the selection or use of such programming or programming service), information service, as defined in 47 U.S.C. 153(24) (the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, using, or making available information via telecommunications, including electronic publishing, but not including any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service), telecommunications service, as defined in 47 U.S.C. 153(53) (the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used), or wireless service.

"Communications facility" would mean the set of equipment and network components, including wires, cables, antennas, and associated facilities, used by a communication service provider to provide communication service.

Right-of-Way Use

These following provisions would apply only to activities of a wireless provider within a right-of-way for the deployment of small cell wireless facilities and associated new or modified utility poles.

("Utility pole" would mean a pole or similar structure that is used in whole or in part for communications service, electric distribution, lighting, traffic control, signage, or a similar function.)

An authority could not enter into an exclusive arrangement with any person for use of an ROW for the construction, operation, marketing, or maintenance of utility poles or the collocation of small cell wireless facilities.

An authority could not charge a wireless provider a rate or fee for the use of an ROW with respect to the collocation of small cell wireless facilities or the construction, installation, mounting, maintenance, modification, operation, or replacement of utility poles in the ROW, unless the authority charged other communications service providers. If an authority were authorized by applicable law to charge a rate or fee to those providers, and did so, any such rate or fee charged to a wireless provider would have to be competitively neutral with regard to other users of the ROW. The rate or fee could not do any of the following:

- Result in a double recovery where existing rates, fees, or taxes already recovered direct and actual costs of managing the rights-of-way.
- Be based on wireless provider revenue or customer counts.
- Be unreasonable or discriminatory.
- Violate any applicable law.
- Exceed an annual amount equal to \$20 times the number of utility poles or wireless support structures in the authority's geographic jurisdiction on which the wireless provider had collocated a small cell wireless facility.

If, on the date the proposed Act took effect, an authority had a rate or fee for the use of an ROW to construct, install, mount, maintain, modify, operate, or replace a small cell wireless facility or wireless support structure, and the rate or fee did not comply with the limitations listed above, an authority would have to revise the rate or fee within 180 days after the Act took effect.

Subject to approval of an application, if required by law, a wireless provider could, as a permitted use not subject to zoning review or approval, collocate small cell wireless facilities and construct, maintain, modify, operate, or replace utility poles in, along, across, upon, and under an ROW. Such structure and facilities would have to be constructed and maintained so as not to obstruct the legal use of the ROW by other utilities and communication services providers. Both of the following provisions would apply.

First, each new or modified utility pole installed in an ROW could not exceed the greater of the following:

- 10 feet above the tallest existing utility pole in place on the Act's effective date and located within 500 feet of the new or modified pole in the same ROW.
- 50 feet above ground level.

Second, small cell wireless facilities installed or modified in an ROW could not extend as described in either of the following:

- More than 10 feet above an existing utility pole or wireless support structure, in place as of the Act's effective date, to which the new small cell wireless facilities were attached.
- Above the height permitted for the installation or modification of a utility pole.

A wireless provider could construct, maintain, or modify a utility pole or small cell wireless facility that exceeded these height limitations along, across, upon, and under an ROW, subject

to applicable zoning regulations. An application would have to comply with any nondiscriminatory requirements that installation in the ROW be underground in areas zoned exclusively for single-family residential use unless prior zoning approval was obtained. Such requirements could not prohibit the replacement of existing structures.

An authority's administration and regulation of an ROW would have to be reasonable, nondiscriminatory, and competitively neutral and would have to comply with applicable law.

An authority could require a wireless provider to repair all damage to an ROW directly caused by the activities of the provider while occupying, constructing, installing, mounting, maintaining, modifying, operating, or replacing its small cell wireless facilities or utility poles in the ROW and to return it to its functional equivalence before the damage. If the provider failed to make the repairs required by the authority within a reasonable time after written notice, the authority could make the repairs and charge the provider the reasonable, documented cost of repairs.

The approval of a small cell wireless facility would authorize only the collocation of a small cell wireless facility and would not authorize any of the following:

- The provision of any particular services.
- The installation, placement, modification, maintenance, or operation of a wireline backhaul facility in an ROW.

Permit

The following provisions would apply only to activities of a wireless provider within or outside of a right-of-way.

Except as otherwise provided, an authority could not prohibit, regulate, or charge for the collocation of small cell wireless facilities.

Small cell wireless facilities would be permitted uses and would not be subject to zoning review or approval if they were collocated within an ROW in any zone or outside the ROW in property not zoned exclusively for single-family residential use.

Except as otherwise provided, an authority could require an application for a permit to collocate a small cell wireless facility if the permit were of general applicability and did not apply exclusively to wireless facilities. The processing of an application for such a permit would be subject to all of the following:

- The authority could not directly or indirectly require an applicant to perform services unrelated to the collocation for which approval was sought, such as reserving fiber, conduit, or pole space for the authority or making other in-kind contributions to the authority.
- The authority could require an applicant to provide information only that was required from other communication service provider applicants that were not wireless providers.
- Within 10 days after receiving an application, an authority would have to notify the applicant whether the application was complete, and if the application were incomplete, the authority would have to specifically identify the missing information.
- The application would have to be processed on a nondiscriminatory basis.
- The authority would have to approve or deny the application and notify the applicant in writing within 60 days after the application was received, and if the authority failed to comply, the application would be considered approved.

- An applicant seeking to collocate small cell wireless facilities within the jurisdiction of a single authority could at the applicant's discretion file a consolidated application and receive a single permit for the collocation of multiple small cell wireless facilities.
- An authority could not institute a moratorium on filing, receiving, or processing applications or issuing permits or other approvals, if any, for the collocation of small cell wireless facilities.

An authority would have to approve an application unless it did not comply with applicable codes. If the application were denied, the written notice would have to explain the reasons for the denial and cite the specific provisions of applicable codes on which the denial was based. The applicant could cure the deficiencies identified by the authority and resubmit the application within 30 days after the denial without paying an additional application fee. The authority would have to limit its review of the revised application to the deficiencies cited in the denial.

A wireless provider would have to commence collocation of a small wireless facility within one year after a permit was granted and would have to pursue collocation to completion. Any time limitation placed on a permit would be void. However, the permittee could voluntarily request that the permit be terminated.

An authority could not require an application approval or permit or require fees or rates for any of the following, and these activities would be exempt from zoning review:

- The replacement of a small cell wireless facility with a small cell wireless facility that was substantially similar or the same size or smaller.
- Routine maintenance of small cell wireless facilities or wireless support structures.
- The installation, placement, maintenance, operation, or replacement of micro wireless facilities that were suspended on cables that were strung between utility poles or wireless support structures in compliance with applicable codes.

An authority would not be prohibited from requiring a permit for work that would reasonably affect traffic patterns or obstruct vehicular traffic in an ROW.

"Micro wireless facility" would mean a small cell wireless facility that is not more than 24 inches in length, 15 inches in width, and 12 inches in height and that does not have an exterior antenna more than 11 inches in length.

"Applicable codes" would mean uniform building, fire, electrical, plumbing, or mechanical codes adopted by a recognized national code organization and adopted under the Single State Construction Code Act to address threats of destruction of property or injury to persons to the extent not inconsistent with the proposed Act.

Permit Fee

An application fee for a permit to collocate a small cell wireless facility would be subject to the following:

- An authority could charge an application fee only if the fee were also charged to other communications service providers within the authority's jurisdiction.
- An authority could not charge an application fee for costs that were already recovered by existing fees, rates, or taxes paid by a wireless provider.

Additionally, the total application fees could not exceed the least of the following:

- The amount charged by an authority for a building permit for any similar commercial construction, activity, or land use development.
- \$100 each for up to five small cell wireless facilities addressed in an application and \$50 for each additional facility addressed in the application.
- The actual, direct, and reasonable costs incurred by the authority relating to the granting or processing of an application.

In any controversy concerning the appropriateness of an application fee, the authority would have the burden of proving that the fee was reasonably related to the actual, direct, and reasonable costs incurred by the authority.

Zoning Approval; Review

The provisions discussed below would apply to zoning reviews for the following activities that would be subject to zoning review and approval, that would not be a permitted use, and that took place within or outside an ROW:

- The modification of existing or installation of new small cell wireless facilities.
- The modification of existing or installation of wireless support structures or utility poles used for such facilities.

The processing of an application for a zoning approval would be subject to the following requirements:

- Within 30 days after receiving an application, an authority would have to notify the applicant whether the application was complete, and if the application were incomplete, the authority would have to specifically identify the missing information.
- The application would have to be processed on a nondiscriminatory basis.

An authority would have to approve or deny an application and notify the applicant in writing within 90 days after an application for a modification of a wireless support structure or installation of a small cell wireless facility were received or 150 days after an application for a new wireless support structure was received. The time period for approval could be tolled to accommodate timely requests by the authority for information required to complete the application. The time period for approval could be extended by mutual agreement between the applicant and authority. If the authority failed to comply, the application would be considered approved.

A decision to deny an application would have to be supported by substantial evidence contained in a written record that was publicly released contemporaneously. An authority could not deny an application unless there was a reasonable basis for the denial. The authority could not deny an application if the denial would discriminate against the applicant with respect to the placement of the facilities of other wireless providers.

An application fee for a zoning approval would be subject to the following:

- An authority could charge an application fee only if the fee were required for similar types of commercial development within the authority's jurisdiction.
- An authority could not charge an application fee for costs that were already recovered by existing fees, rates, or taxes paid by a wireless provider.

Total application fees for a zoning approval, if authorized, could not exceed the least of the following:

- The amount charged by the authority for a building permit for any similar commercial construction, activity, or land use.
- \$1,000 for a new wireless support structure or a modification of a wireless support structure.
- The actual, direct, and reasonable costs incurred by an authority relating to the granting or processing of an application.

In any controversy concerning the appropriateness of an application fee, the authority would have the burden of proving that the fee was reasonably related to the actual, direct, and reasonable costs incurred by the authority.

An authority would have to receive and process an application for a zoning approval subject to all of the following:

- An authority could not evaluate or require an applicant to submit information about an applicant's business decisions with respect to any of the following: the need for a wireless support structure, utility pole, or small cell wireless facilities; or the applicant's service customer demand for the service, or the quality of service.
- Any requirements regarding the appearance of facilities, including those relating to materials used or arranging, screening, or landscaping, would have to be reasonable.
- Any setback or fall zone requirement would have to be substantially similar to such a requirement imposed on other types of commercial structures of a similar height.
- An authority could not institute a moratorium on either of the following: filing, receiving, or processing applications; or issuing approvals for installations that were not a permitted use.

An applicant's business decision on the type and location of small cell wireless facilities, wireless support structures, utility poles, or technology to be used would be presumed to be reasonable. This presumption would not apply with respect to the height of wireless facilities, wireless support structures, or utility poles. An authority could consider the height of such structures in its zoning review, but could not reasonably discriminate between the applicant and other communications service providers.

A wireless provider would have to commence construction of an approved structure or facilities within two years after a permit was granted and would have to pursue construction to completion. Any time limitation placed on the permit would be void. However, the permittee could voluntarily request that the permit be terminated.

Collocation Rates & Fees

A person owning or controlling authority poles or utility poles for designated services could not enter into an exclusive agreement with any person for the right to attach to the poles.

("Authority pole" would mean either of the following that was owned or operated by an authority and located in the ROW:

- A utility pole, other than a utility pole for designated services.
- A pole or similar structure that supports only wireless facilities.)

The rates and fees for the collocation of small cell wireless facilities on authority poles or utility poles for designated services would have to be nondiscriminatory regardless of the services provided by the collocating program.

The rate to collocate small cell wireless facilities on utility poles for designated services could not exceed the lesser of the following: \$20 per year per utility pole for designated services; or the annual recurring rate that would be permitted under rules adopted by the Federal Communications Commission (FCC) under 47 U.S.C. 224(e), if the rates were regulated by the FCC. (47 U.S.C. 224(e) specifies that any increase in the rates for pole attachments that result from regulations adopted by the FCC must be phased in equal annual increments over a period of five years beginning on the effective date of the regulations.)

The total annual rate to collocate small cell wireless facilities on authority poles and any activities related to such collocations could not exceed the lesser of the following:

- \$20 per year per utility pole.
- The actual, direct, and reasonable costs related to the collocation on the authority pole.

In any controversy concerning the appropriateness of a rate for an authority pole, the authority would have the burden of proving that the rate was reasonably related to the actual, direct, and reasonable costs incurred for use of space on the authority pole for the period.

If an authority, a municipal electric utility, or a cooperative electric utility had an existing pole attachment rate, fee, or other term that did not comply with these provisions, the authority, municipal electric utility, or cooperative electric utility would have to revise the rate, fee, or term to comply with the Act within 180 days after its effective date.

Within the later of 180 days after the Act took effect or 90 days after receiving a request to collocate its first small cell wireless facility on an authority pole or a utility pole for designated services owned or controlled by an authority, a person owning or controlling such poles would have to make available, through ordinance or otherwise, the rates, fees, and terms for the collocation of small cell wireless facilities on the poles. The rates, fees, and terms would have to comply with all of the following:

- The rates, fees, and terms would have to be nondiscriminatory, competitively neutral, and commercially reasonable.
- For authority poles that did not support aerial cables used for video, communications, or electric service, the authority would have to provide a good-faith estimate for any make-ready work within 60 days after receiving a complete application, and any make-ready work would have to be completed within 60 days of the applicant's written acceptance of the good-faith estimate.
- The person owning or controlling the authority pole or utility pole for designated services could not require more make-ready work than required to comply with law or industry standards.

For authority poles that supported aerial cables used for video, communications, or electric service, and for utility poles for designated services, the parties would have to comply with the process for make-ready work under 47 U.S.C. 224 and implementing orders and regulations. (Under that section, whenever the owner of a pole intends to modify or alter it, the owner must provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that the entity may have a reasonable opportunity to add to or modify its existing attachment.) The good-faith estimate of the person owning or controlling the pole for any make-ready work would have to include pole replacement if necessary.

Additionally, fees for make-ready work could not: include costs related to preexisting or prior damage or noncompliance; include any consultant fees or expenses; or exceed actual costs or the amount charged to other communications service providers for similar work.

("Make-ready work" would mean work necessary to enable an authority pole or utility pole to support collocation, which could include authority pole or utility pole modification or replacement, modification of lines, or installation of guys and anchors.)

These rates, fees, terms, and conditions for the collocation of small cell wireless facilities would apply to the pole attachments of communication service providers to utility poles for designated services.

Authority Limitations

An authority could continue to exercise zoning, land use, planning, and permitting authority within its territorial boundaries, including with respect to wireless support structures and utility poles. However, an authority would not have jurisdiction or authority over the design, engineering, construction, installation, or operation of a small cell wireless facility located in an interior structure or upon the site of a campus, stadium, or athletic facility not otherwise owned or controlled by the authority, other than to enforce applicable codes. The proposed Act would not authorize the State or any other authority to require wireless facility deployment or to regulate wireless services.

An authority could not require a wireless provider to do either of the following with respect to a small cell wireless facility, a wireless support structure, or a utility pole:

- Indemnify and hold the authority and its officers and employees harmless against any claims, lawsuits, judgments, costs, liens, losses, expenses, or fees, unless a court of competent jurisdiction had found that the negligence of the wireless provider while installing, repairing, or maintaining small cell wireless facilities, wireless support structures, or utility poles caused the harm that gave rise to the claims, lawsuits, judgments, costs, liens, losses, expenses, or fees.
- Require a wireless provider to obtain insurance naming the authority or its officers or employees as additional insureds against any claims, lawsuits, judgments, costs, liens, losses, expenses, or fees.

Fees Less than Maximum

An authority could establish a fee less than the maximum specified for the use of an ROW, an application for a permit, or the collocation of small cell wireless facilities on authority or utility poles, subject to the other requirements of the Act.

Rate Dispute

Unless agreed otherwise and pending resolution of a right-of-way access rate dispute, an authority controlling access to and use of an ROW would have to allow the placement of a wireless facility or wireless support structure at a temporary rate of one-half of authority-proposed annual rates or \$20, whichever was less. The rates would have to be tried up upon final resolution of the issue.

Pending resolution of a dispute concerning rates for collocation of small cell wireless facilities on authority poles or utility poles for designated services, the person owning or controlling the poles would have to allow the wireless provider to collocate small cell wireless facilities on its poles at annual rates of not more than \$20 per year per utility pole. The rates would have to be tried up upon final resolution of the dispute.

Legislative Analyst: Stephen Jackson

FISCAL IMPACT

The bill would have a negative fiscal impact on the State and on local units of government that were unable to recover the operational costs of approving and inspecting certain wireless facilities and structures in the right-of-way through the capped fees that the bill would establish. The impact on a specific governmental unit would depend on the complexity and number of applications as well as local conditions and resources. Governments with a revenue loss would be required to provide the authorization services and fund those operational costs from other revenue sources if necessary.

Under current law, fees cannot be set at a level in excess of the cost of providing a service. The bill would cap the fees charged to wireless providers seeking use of the right-of-way, in cases where applications would be allowed or required, at the lesser of the amount fixed in the bill for various types of installations or permits, or the actual cost of managing the right-of-way. The bill also would appear to limit the ability of State and local governments to deny or challenge the installation of utility poles in some cases, which could create additional State and local costs if the installation conflicted with the requirements or plan for managing the right-of-way. The State or local government would not be able to specify the date by which a project would have to conclude or the permit would expire. Depending on the nature and duration of a project, partial completion could increase the difficulty and cost of managing the right-of-way, although the bill would allow State and local governments to require that any damage to the right-of-way by a wireless provider be repaired to a level of functionality equivalent to its condition before the damage. The State and local governments also could incur costs to defend the determination of the amount of fees charged. In addition, the State currently has a contract with a company to manage permitting in the right-of-way. The bill would appear to prohibit this type of contract.

Fiscal Analyst: Elizabeth Pratt

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.