

STORAGE NAME: h3291s1b.ft

DATE: April 15, 1998

**HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE COMMITTEE ON
FINANCE AND TAXATION
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 3291

RELATING TO: Telecommunications Rights-of-Way

SPONSOR(S): Committee on Utilities and Communications, Rep. Valdes and others

COMPANION BILL(S): SB 1704 (s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) UTILITIES AND COMMUNICATIONS YEAS 14 NAYS 0
- (2) COMMUNITY AFFAIRS YEAS 9 NAYS 0
- (3) FINANCE AND TAXATION YEAS 14 NAYS 0
- (4)
- (5)

I. SUMMARY

This bill addresses the usage of rights-of-way for telecommunications companies and the fees or charges imposed by municipalities for the use of rights-of-way.

The bill provides clarification that "in-kind" contributions are included within the one percent fee cap.

The bill provides clarification that charges and fees imposed by a municipality on current telecommunications companies are limited to those authorized by the legislature. Also, municipalities are prohibited from requiring or soliciting in-kind compensation in lieu of fees; however, existing ordinances and agreements providing for in-kind compensation are "grandfathered."

The bill clarifies that local government authority over rights-of-way cannot be used as a basis for asserting regulatory control over telecommunications companies. Telecommunications companies that are lawfully occupying roads of an incorporated city or town on the effective date of the act are not required to obtain additional consent from the city or town; however, the city and town can impose fees and adopt reasonable rules and regulations.

This bill does not apply to private property, building permits or pole attachments; and, except as expressly provided, the bill does not limit or expand any powers counties may have relating to roads and rights-of-way.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

General Background: The issues associated with Florida rights-of-way are part of a much larger national debate concerning the respective rights and responsibilities of telecommunications providers and local, state, and federal government. Passage of the 1995 Florida Telecommunications Act and the 1996 Federal Telecommunications Act opened local communications markets to competition.

In an open telecommunications market, the terms and conditions required for the use of rights-of-way (or franchise agreements) may affect how competition develops. The possibility of numerous telecommunications providers entering the local market, coupled with the inclusion of state and federal statutory language prohibiting discrimination between carriers by local government, has resulted in an increased number of disputes associated with the use of rights-of-way.

In entering into franchise agreements, cities must be careful not to discriminate between providers. At the same time, cities must minimize disruptions that might be caused when numerous providers, with different levels of expertise of constructing towers, place facilities in public rights-of-way. Negotiations regarding franchise fees are sensitive because cities may be dependant on the revenues from such fees. As competition develops, control of rights-of-way and other city property has become an autonomy issue for local governments nationally.

The industry has reported that some local governments are attempting to impose unreasonable requirements and local regulation on telecommunications providers as a condition for the use of public rights-of-way. Such requirements have been characterized by the Federal Communications Commission as an impermissible "third tier" of telecommunications regulation; that is, a local layer of regulation in addition to state and federal regulation.

Federal Code

The 1996 Federal Telecommunications Act requires the removal of barriers to entry into the telecommunications market. To this end, 47 U.S.C. 253 provides the following:

- State and local requirements that have the effect of prohibiting the ability of any entity to provide telecommunications services are prohibited. 47 U.S.C. 253(a);
- States may impose, on a competitively neutral basis, requirements that are necessary to protect the public safety and welfare. 47 U.S.C. 253(b);
- The Federal Communications Commission is authorized to preempt State and local requirements that are inconsistent with the foregoing. 47 U.S.C. 253(d).

47 U.S.C. 253 does not affect

. . . the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications

providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government. 47 U.S.C. 253(c).

Florida Statutes

Section 362.01, Florida Statutes, authorizes telephone companies to build facilities on, or beside, any public road or highway provided the facilities do not interfere with the use of the road or highway. This section also provides that “permission to occupy the streets of an incorporated city or town must first be obtained from the city or town council.”

Section 364.0361, Florida Statutes, requires that

[a] local government shall treat each telecommunications company in a nondiscriminatory manner when exercising its authority to grant franchises to a telecommunications company or to otherwise establish conditions or compensation for the use of rights-of-way or other public property by a telecommunications company.

Section 337.401, Florida Statutes, provides the following:

- Local governmental entities have authority to prescribe and enforce reasonable rules or regulations with reference to placing and maintaining telephone lines along, across, or on any public road. Section 337.401(1), Florida Statutes.
- Local governmental entities may grant the use of a right-of-way in accordance with rules and regulations the local entity adopts. Section 337.401(2), Florida Statutes.
- The installation of facilities is prohibited unless authorized by written permit issued by the local authority. *Id.*
- A fee cap is set at 1 percent of gross receipts---on recurring local service revenues for services provided within the corporate limits of the municipality by the telecommunications provider---as a condition for granting permission to occupy municipal streets and rights-of-way. Section 337.401(3), Florida Statutes.
- Long distance providers are to pay not less than \$500 per linear mile for facilities that make physical use of the municipal right-of-way. Section 337.401(4), Florida Statutes.
- Fees charged to long distance providers in excess of \$500 per linear mile must be nondiscriminatory and shall not exceed the sum of statutorily specified costs. *Id.*

The terms and conditions of some older franchise agreements are “grandfathered” by section 337.401, Florida Statutes.

B. EFFECT OF PROPOSED CHANGES:

This bill addresses the usage of rights-of-way for telecommunications companies and the fees or charges imposed by municipalities for the use of rights-of-way.

A "WHEREAS" clause expresses the need to clarify authority of local governmental entities in relation to telecommunications providers.

Section 337.401, Florida Statutes is amended as follows:

Subsection (3) is amended (updated) to apply to "telecommunications companies" instead of the old description which is "telephone companies." The term "municipal authority" is changed to read simply "municipality." The bill also clarifies that "in-kind" contributions are included within the one percent cap.

Subsection (5) is created to clarify that charges and fees imposed by a municipality on telecommunications companies are limited to those authorized by the legislature. Subsection (5) also prohibits a municipality from requiring or soliciting in-kind compensation in lieu of fees imposed pursuant to this section. Existing ordinances and agreements providing for in-kind compensation are "grandfathered."

Subsection (6) is created to clarify that local government authority over rights-of-way cannot be used as a basis for asserting regulatory control over telecommunications companies. Such regulatory jurisdiction is with the Florida Public Service Commission and the Federal Communications Commission.

Subsection (7) is created to provide that telecommunications companies that are lawfully occupying roads of an incorporated city or town on the effective date of the act are not required to obtain additional consent from the city or town. However, the city and town can impose fees and adopt reasonable rules and regulations as provided in the bill.

Subsection (8) is created to clarify that the bill does not modify tax authority pursuant to section 166.231, Florida Statutes or the duties of a telecommunications provider pursuant to sections 337.402-404, Florida Statutes. The bill does not apply to private property, building permits or pole attachments. Except as expressly provided, the bill does not limit or expand any powers counties may have relating to roads and rights-of-way.

Subsection (9) is created to provide that for purposes of this section "telecommunications company" has the meaning defined in section 364.02, Florida Statutes. Such companies provide services that are regulated by the Florida Public Service Commission. Entities offering solely wireless telecommunications and cable television services are excluded.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

N/A.

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A.

(2) what is the cost of such responsibility at the new level/agency?

N/A.

(3) how is the new agency accountable to the people governed?

N/A.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

Yes. Telecommunications companies pay fees to occupy rights-of-ways.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A.

(2) Who makes the decisions?

N/A.

(3) Are private alternatives permitted?

N/A.

(4) Are families required to participate in a program?

N/A.

(5) Are families penalized for not participating in a program?

N/A.

b. Does the bill directly affect the legal rights and obligations between family members?

N/A.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A.

(2) service providers?

N/A.

(3) government employees/agencies?

N/A.

D. STATUTE(S) AFFECTED:

Section 337.401, Florida Statutes.

E. SECTION-BY-SECTION RESEARCH:

Section 1: Amends Section 337.401, Florida Statutes, as follows:

Subsection (3) is amended (updated) to apply to “telecommunications companies” instead of the old description which is “telephone companies.”

Subsection (5) is created to clarify that charges and fees imposed by a municipality on telecommunications companies are limited to those authorized by the legislature. This subsection also prohibits a municipality from requiring or soliciting in-kind compensation in lieu of fees imposed pursuant to this section. Existing ordinances and agreements providing for in-kind compensation are “grandfathered.”

Subsection (6) is created to clarify that local government authority over rights-of-way cannot be used as a basis for asserting regulatory control over telecommunications companies. Such regulatory jurisdiction is with the Florida Public Service Commission and the Federal Communications Commission.

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Subsection (8) is created to clarify that the bill does not modify tax authority pursuant to section 166.231, Florida Statutes or the duties of a telecommunications provider pursuant to sections 337.402-404, Florida Statutes. The bill does not apply to private property, building permits or pole attachments. Except as expressly provided, the bill does not limit or expand any powers counties may have relating to roads and rights-of-way.

Subsection (9) is created to provide that for purposes of this section "telecommunications company" has the meaning defined in section 364.02, Florida Statutes. Such companies provide services that are regulated by the Florida Public Service Commission. Entities offering solely wireless telecommunications and cable television services are excluded.

Section 2: The bill takes effect upon becoming a law.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Indeterminate.

2. Recurring Effects:

Indeterminate.

3. Long Run Effects Other Than Normal Growth:

Indeterminate.

4. Total Revenues and Expenditures:

Indeterminate.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

Indeterminate.

2. Recurring Effects:

Indeterminate.

3. Long Run Effects Other Than Normal Growth:

Indeterminate.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

Indeterminate.

3. Effects on Competition, Private Enterprise and Employment Markets:

Indeterminate.

D. FISCAL COMMENTS:

The bill does not raise or lower franchise fees, but does clarify the circumstance in which they are levied. There is no anticipated fiscal impact.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

There have been extensive negotiations between the industry and local governments regarding the language in the bill.

The Florida Association of Counties: The Florida Association of Counties (FAC), believes that CS/HB 3291 should be amended to clarify county authority to charge for the use of county rights-of-way. The following is an excerpt from FAC's letter to Representative Gay, Chairman of the House Committee on Community Affairs, regarding CS/HB 3291:

Counties have very clear authority to charge other users of the rights-of-ways. Through litigation counties have established the home rule authority to charge electric companies--both investor owned and member owned rural electric companies. See Santa Rosa County v. Gulf Power, 635 So.2d 96 (Fla. 1st DCA 1994), rev. den'd, 645 So.2d 452 (Fla. 1994). Both federal law and state statutes expressly allow counties to charge cable television companies for the use of the rights-of-ways, although the rate is capped at five percent. See 47 U.S.C., §542(b); §166.042(2), Fla. Stat.

There is no agreement as to whether current law allows counties to charge telephone companies for the use of the rights-of-way. In 1994, the First District Court of Appeal in Santa Rosa County held that county authority to regulate telephone companies, including the power to charge for the use of rights of way, had been preempted by the Legislature to the Florida Public Service Commission in chapter 364, Florida Statutes. Thereafter, in 1995, the Legislature amended chapter 364 to restore county home rule authority to charge telephone companies for the use of rights-of way. This provision states:

A local government shall treat each telecommunications company in a nondiscriminatory manner when exercising its authority to grant franchise to a telecommunications company or to otherwise establish conditions or compensation for the use of rights-of-way or other public property by a telecommunications company.

§33, ch. 95-403, Laws of Florida.

Currently, Dade County is the only county charging a telephone company for the use of rights-of-way. However, many counties are considering the imposition of fees on the use of rights-of-ways by telephone companies and many of the telephone companies are resisting county imposition, claiming that counties have no authority to impose fees.

Letter from S. Bleakley to Rep. Greg Gay of 03/17/98, pp. 1 & 2.

[Note: The House Committee on Utilities and Communications, held a meeting on January 6, 1998, to discuss HB 3291. According to the *Rights-of-Way Survey of HB 3291*, "Miami-Dade County has a legal obligation under federal and state law to provide a level playing field and is preparing a proposed ordinance to establish a permanent licensing mechanism." The survey noted that, prior to the passage of the ordinance, "the County passed a resolution in 1997 allowing the County Manager to enter into interim agreements with telecommunications providers to allow new entrants into the marketplace." *Id.*]

The Florida League of Cities: The Florida League of Cities supports CS/HB 3291.

BellSouth Telecommunications, Inc.: BellSouth Telecommunications, Inc., supports CS/HB 3291.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On April 14, 1998, the Committee on Finance and Taxation adopted an amendment that provides that nothing in the section shall expand or limit current local government authority to impose any fee pursuant to 47 U.S.C. subsections 542 and 573. The amendment was left traveling with the bill.

VII. SIGNATURES:

COMMITTEE ON UTILITIES AND COMMUNICATIONS:

Prepared by:

Legislative Research Director:

Charles Murphy

Patrick L "Booter" Imhof

AS REVISED BY THE COMMITTEE ON Community Affairs:

Prepared by:

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Tonya S. Chavis, Esq.

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AS FURTHER REVISED BY THE COMMITTEE ON FINANCE AND TAXATION:

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