SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/CS/SB 2774

SPONSOR: Comprehensive Planning Committee, Communication and Public Utilities Committee and Senator Bennett

SUBJECT: Wireless Emergency Telephone System

DATE: April 16, 2004 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wiehle	Caldwell	CU	Fav/CS
2.	Cooper	Yeatman	CP	Fav/CS
3.			HP	
4.				
5.				
6.				

I. Summary:

The Committee Substitute for Committee Substitute (CS) imposes limits on local government regulation relating to siting of wireless communications facilities. Specifically, the CS:

- deletes the requirement that the Auditor General annually audit the Wireless Emergency Telephone System Fund;
- creates new definitions;
- requires the Board to establish a subcommittee to analyze the cost and effectiveness of a non-emergency 311 system, and that the subcommittee report its findings and recommendation to the Board by December 31, 2004;
- creates new standards for siting wireless communications facilities;
- revises the siting permit application process;
- requires the Board of Trustees of the Internal Improvement Fund or the Division of State Lands of the Department of Environmental Protection to assess state-owned properties for availability for placement of E911 wireless communications facilities and provide an inventory of available and non-available state-owned properties by January 1, 2005;
- revises restrictions on facilities;
- creates a cause of action for any person adversely affected by any action or failure to act by a local government which is inconsistent with the statute on siting of wireless communications facilities;
- changes the restrictions imposed on county expenditures of E911 funds; and
- specifies that nothing in this act requires the governing authority of any airport to make space or facilities available for siting wireless facilities, except as determined appropriate by the governing board of the airport.

The CS substantially amends sections 11.45, 365.172, and 365.173 of the Florida Statutes.

II. Present Situation:

See Effect of Proposed Changes.

III. Effect of Proposed Changes:

Section 1 amends s. 11.45, F.S., to delete the requirement that the Auditor General annually audit the Wireless Emergency Telephone System.

Section 2 amends the provisions of s. 365.172, F.S., relating to siting of wireless communications facilities.

Definitions
Subsection (3) is amended to create or amend the following definitions:

- Administrative review means "the nondiscretionary review conducted by local governmental staff for compliance with local government ordinances, but does not include a public hearing or review of public input."
- Building-permit review means a review of compliance with building code requirements of chapter 553 and excludes a review for compliance with land development regulations.
- Collocation means the situation when a second or subsequent wireless provider using an existing structure to locate a second or subsequent antenna, and also 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 antennas."[1]
- Existing structure is defined to mean "a structure that exists at the time an application for permission to place antennas on a structure is filed with a local government. The term includes any structure that can support the attachment of antennas, including, but not limited to, towers, buildings, utility structures, light poles, water towers, clock towers, bell towers, and steeples."
- Historic building, structure, or district means any building, structure, or district that has been officially designated as a historic building, historic structure, or historic district through a federal, state, or local designation program.
- Land-development regulation means "any ordinance enacted by a local governing body for the regulation of any aspect of development, including an ordinance governing zoning, subdivisions, landscaping, tree protection, or signs, 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 chapter 553."
- Wireless provider is included in the term "provider" in current law.
- Tower means "any structure designed primarily to support a wireless antenna."
- Wireless communications facility means "any equipment or facility used to provide service, and includes, but is not limited to, antennas, towers, equipment enclosures, cabling, antenna brackets, and other equipment."

[1] This definition is awkward, in that the second part of the definition seems to refer to components of an existing structure.

- Wireless communications site means "the area on the roof, structure, or ground which is designed, intended to be used, or is used for the location of a wireless communications facility and any fencing and landscaping provided in association with the wireless communications facility."[2]

Wireless 911 Board

Subsection (6) is amended to require the Wireless 911 Board to hire an independent executive director with experience in telecommunications and emergency issues. It also requires the Board to secure the services of an independent, private attorney. Finally, it requires the Board to establish a subcommittee to analyze the cost and effectiveness of a non-emergency 311 system, and report its findings and recommendation to the Board by December 31, 2004.

Wireless Fee

Subsection (8) is amended to specify that the state and local governments are not "customers", and consequently are not subject to the Wireless E911 fee.

New siting standards

In order to balance the public need for reliable wireless systems (both E911 and non-E911) with the governmental zoning and land-development regulations, the CS amends subsection (11) to create minimum standards applicable to a local government's regulation of the placement, construction, or modification of a wireless communications facility.

The statute currently provides that 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 adopted pursuant a comprehensive plan, 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. Also, nothing in the statute relieves the permitholder for or owner of the existing structure of compliance with any applicable condition or requirement of a permit, agreement, or land development regulation, including any aesthetic requirements, or law.

Paragraph (11)(a) is changed to delete a reference to land development regulations "pursuant to s. 163.3202." This statutory provision is the general controlling authority for counties and municipal government land development regulations. The CS also limits application of permit, agreement, or land development regulations to those that were in effect at the time the existing structure or initial antenna location was permitted.

Proposed subparagraph (11)(a)2. provides that an existing tower, including a nonconforming tower, may be replaced without increasing the height in order to permit collocation, provided that the replacement tower is a monopole tower or, if the tower to be replaced is a camouflaged

[2] As the phone company may use an existing structure that it does not own, this arguably makes the fencing and landscaping of a church, a state office building, a school, or a shopping center a part of the wireless communications site.

tower, the replacement tower is a like-camouflaged tower. The replacement is subject to only administrative review and building-permit review.

Proposed subparagraph (11)(b)1. provides that a local government is limited to its land use and zoning regulatory powers when evaluating an application for placement of a wireless facility. Local governments are prohibited from reviewing or considering a wireless provider's business need for a specific location for a wireless communications site or the need for wireless service to be provided from a particular site – unless this information is provided voluntarily. It also prohibits local government from evaluating the wireless provider's service quality or the network design, with limited exceptions.

Proposed paragraph (11)(b)2. provides that requirements that setback or distance separation required of a tower may not exceed the minimum distance necessary to satisfy the structural safety or aesthetic concerns protected by the setback or distance separation.

Proposed paragraph (11)(b)3. requires that a local government must provide a reasonable opportunity for placing, constructing, and modifying some form of wireless communications facilities in all parts of a local government's jurisdiction, unless it can be specifically demonstrated that a prohibition of all types of wireless communications facilities in a specific location or area is the only manner in which to protect the public health, safety, and welfare of that area.

Proposed paragraph (11)(b)4. provides that a local government may impose a fee, surety, or insurance requirement on a wireless provider when applying to place, construct, or modify a wireless communications facility if the fee, surety, or insurance requirement is also imposed on applicants seeking similar types of zoning, land use, or building-permit review. Fees for review of applications for wireless communications facilities by consultants or experts who are routinely engaged to review general zoning and land use matters on behalf of the local government may be recovered, but only if the recovery is routinely sought from all applicants seeking zoning or land-development approvals, and any fees must be reasonable.

Revisions to application process

Currently, subparagraph (11)(b) allows local governments to receive evidence of proper Federal Communications Commission (FCC) licensure from an applicant, and to receive information from the FCC as to the applicant's compliance with the federal regulations. The CS re-designates subparagraph (11)(b) as subparagraph (11)(c), and authorizes local governments to require evidence of compliance with applicable Federal Aviation Administration (FAA) requirements under 14 C.F.R s. 77. In addition, the local government may request additional information from the FCC related to "spectrum use" from the applicant.

Currently, subparagraph (11)(c)1. requires a local government to grant or deny a properly completed application for a permit for the collocation of a wireless communications facility on property, buildings, or structures within the local government's jurisdiction within 45 business days after the date the properly completed application is initially submitted in accordance with the applicable local government application procedures, provided that such permit complies with

applicable federal regulations and applicable local zoning or land development regulations, including any aesthetic requirements. Local building regulations are to apply.

Currently, subparagraph (11)(c)2. has the same requirements for granting or denying an application for the siting of a new wireless tower or antenna on property, buildings, or structures within 90 days after the date the properly completed application is initially submitted.

The CS renumbers these provisions as subparagraphs (11)(d)1. and 2., and applies the 45 day approval provisions to a properly completed application for a wireless communications facility reviewed only through administrative review of building permit review. If multiple departments must conduct administrative reviews, they must be done concurrently within this time. The CS applies the 90-day approval provisions if approval of the application is through some other type of review. If the review requires both administrative review and non-administrative review, all reviews must be done within "the applicable time frame indicated in this paragraph." Presumably this means that the administrative review still must be done within the 45 day period, not both reviews done within the 90 day period.

Sub-subparagraph 3.a. creates a new provision that an application is deemed submitted or resubmitted on the date the application is filed with the local government. In addition, if an application is not initially properly completed and the applicant resubmits information to cure stated deficiencies, the local government is to notify the applicant within 20 business days as to whether the application is now properly completed or if there are any remaining deficiencies. Any deficiencies not specified in the initial notice are waived. However, if the specified deficiency is not cured when the applicant resubmits its application, the local government may continue to request the information until the deficiency is cured.

Revisions to restrictions on facilities

Currently, paragraph (11)(d) provides that if 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, are required within the existing secured equipment compound within the existing site, they are to be deemed a permitted use or activity. Local building and land development regulations, including any aesthetic requirements, apply. The CS deletes this paragraph.

Proposed paragraph (11)(e) prohibits a local government from imposing square footage or height limitations on equipment enclosures, cabinets, or buildings inconsistent with those required for other structures in the same zoning district. This paragraph supersedes any existing limitation imposed on equipment enclosures, cabinets, or buildings by ordinance, resolution, or land development regulation.

Proposed paragraph (11)(g) provides if a local government regulation or procedure does not conform to the requirements of this section, the regulation or procedure must be amended to do so by January 1, 2005.

State government-owned property

Current paragraph (11)(e) directs the Department of Management Services (DMS) to negotiate leases for wireless facilities that provide access to non-transportation state-owned property. This paragraph is re-designated as paragraph (h) and amended to provide that use of state government-owned property for wireless communications facilities is encouraged. In addition, sub-paragraph 2. is created to require the Board of Trustees of the Internal Improvement Fund or the Division of State Lands of the Department of Environmental Protection to assess state-owned properties for availability for placement of E911 wireless communications facilities and provide an inventory of available and non-available state-owned properties to DMS by January 1, 2005. If identified as available, such property is presumed to be available to wireless providers unless the government agency responsible for managing or leasing the property demonstrates that such a facility will "materially interfere" with the use by the agency or with the lease terms of the government agency leasing the property, or upon showing that access to the property is not available for security purposes or is otherwise not allowed for public health, safety, and welfare reasons. If determined available, leases for non-transportation state government-owned property shall be procured through negotiation by DMS or through other competitive procurement methods. Leases shall be granted on a space available basis as determined by DMS. Fifty percent of proceeds from the lease payments shall be deposited in the Wireless Emergency Telephone System Fund to fund E911 and 911 services, with priority given to rural counties. The remaining proceeds are to be used to administer the lease program and to benefit the owning agency. The leasing process shall be as established by rule adopted by DMS.

Sub-paragraph 3. is created to provide that review or consideration of any applicable zoning land use issues shall be with the local government. If a wireless provider applies to enter into a lease to use state government-owned property for a wireless communications facility, DMS or DOT, as applicable, is responsible to review or consider any zoning or land use issues.

Sub-paragraph 4. is created to establish permitting review guideline for DMS and DOT similar to those imposed on local governments. These agencies have 45 business days after the date the application is determined to be properly completed to grant or deny a permit. DOT and DMS, as applicable, have 20 business days to notify the applicant as to whether the application is properly completed and has been properly submitted. If there is a deficiency in the application, the agency must indicate with specificity any deficiencies which, if cured, will make the application properly completed. Upon resubmission of information, the agency must notify the applicant within 10 business days whether the application is properly completed or if there are any remaining deficiencies which must be cured. If the applicable agency fails to grant or deny a properly completed application within these timeframes, and the timeframe has not be voluntarily waived, the application shall be deemed automatically approved.

Remedies for delays in siting wireless communications facilities

Proposed paragraph (11)(i) creates a cause of action for any person adversely affected by any action or failure to act by a local government which is inconsistent with subsection (11) on facilitating E911 service implementation (siting of wireless communications facilities). The adversely affected person may bring an action in a court of competent jurisdiction within 30 days after the action or the failure to act. The court is to consider the matter on an expedited basis.

Currently, paragraph (11)(f) provides that if any wireless telephone service provider reports to the Wireless 911 Board by September 1, 2003, that the provider has experienced unreasonable delays in locating wireless telecommunications facilities necessary to comply with federal Phase II E911 requirements, the board must, no later than September 30, 2003, establish a subcommittee to make recommendations to facilitate the siting process.

In response to 19 reports from service providers, a subcommittee was formed to address siting-process issues. In their annual report to the Legislature, the Wireless 911 Board reported that the subcommittee found

> "that no 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 jurisdictions…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."[3]

The bill deletes paragraph (11)(f) of s. 365.172, F.S., as it is now obsolete.

Subsection (13) is created to provide that:

> It is the intent of this act to assure the safety of employees, passengers and freight at airports, as defined in s. 330.27(2) and not to require the placement at any airport of any wireless communication facility unless approved by the airport. Therefore, this section shall not require the governing authority of any airport to make available any site, space or facility owned or controlled by such airport to a service provider for the location or collocation of any tower or wireless communication facility, except on such terms and with such limitation as the governing authority of such airport may deem safe and appropriate.

Section 3 amends s. 365.173(2), F.S., to change the restrictions imposed on county expenditures of E911 funds. Counties receiving E911 Wireless 911 fee proceeds may only use such fee proceeds for the recurring costs of providing 911 or E911 service, or costs of complying with FCC rules relating to such service.

Currently, subsection (2) requires the Auditor General to annually audit the Wireless Emergency Telephone Trust Fund. This provision is deleted.

Section 4 provides that the bill takes effect July 1, 2004.

[3] 2003 Annual Report of the Wireless 911 Board, February 27, 2004. p. 21.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

New paragraph 365.172(11)(e), F.S., provides that its prohibition against a local government imposing square footage or height limitations on an accessory wireless communications facility in excess of those required for principal buildings in the same zoning district supersedes any existing limitation imposed on a wireless communications facility by agreement, ordinance, resolution, or land development code. This may be subject to challenge on impairment of contract under s. 10, Art. I, State Constitution.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

It should be much easier for wireless communications providers to site facilities.

C. Government Sector Impact:

While the costs to the state and local government are indeterminate, these government entities are authorized to either assess permit review fees or will recover imposed costs through proceeds from property leases.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.