

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 305
SPONSOR(S): Littlefield
TIED BILLS:

Wireless Emergency Telephone System

IDEN./SIM. BILLS: SB 620

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Utilities & Telecommunications Committee</u>	<u></u>	<u>Cater</u>	<u>Holt</u>
2) <u>Local Government Council</u>	<u></u>	<u></u>	<u></u>
3) <u>State Administration Appropriations Committee</u>	<u></u>	<u></u>	<u></u>
4) <u>Commerce Council</u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

The bill relates to various aspects of wireless emergency telephone systems. The bill removes annual audit of the Wireless Telephone System fund from the duties of the Auditor General. It also removes the provision in the definitions section of s. 364.02, F.S., where commercial mobile radio systems are subject to fees imposed under s. 364.336, F.S.

Most of the bill's changes amend various subsections of s. 365.172, F.S. First, various definitions are added to s. 365.172(a), F.S. The authority of the Wireless E911 Board (Board) contained in s. 365.172(6), F.S. is amended to allow the Board to hire an independent executive director and to secure the services of an independent private attorney. The wireless E911 fee provisions in s. 365.172(8), F.S. is amended, to say for the purposes of the wireless E911 fee state and local governments are not customers.

The bill modifies the standards that local governments must apply in its regulation of the placement, construction, or modification of a wireless communications facility. It provides that collocations are subject only to a building permit review. If the height of the tower does not increase, an existing tower may be modified to permit collocation through no more than an administrative or building permit review. It limits a local government's evaluation of an application for placement of a wireless facility to issues concerning land development and zoning. It limits restrictions on setback distances, placement in residential areas, fees local governments may impose, and structural or construction standards that may be imposed.

The bill provides time limits for local governments to grant or deny properly completed applications.

The bill modifies s. 365.173, F.S., to require counties to establish a fund to be used exclusively for the receipts and expenditures associated with wireless E911, and requires county commissioners to use these funds for wireless E911 related purposes. This fund is to be incorporated into the annual county budget and incorporated within its financial audit.

The bill adds language to s. 337.401(3), F.S. requiring municipalities or counties to exercise their zoning or land use authority to treat communications service providers in a manner that is competitively neutral and nondiscriminatory in the use of public roads and rights-of-way and may not require individual agreements.

This act shall take effect on July 1, 2005.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: The bill gives the Wireless 911 Board the authority to hire an independent executive director and an outside attorney. The bill provides that local governments cannot place any stricter requirements on wireless telecommunications facilities than it does for any similar land use.

Maintain Public Security: The bill is intended facilitate the implementation of wireless E911 services, making it easier to reach emergency services.

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

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

Statutory History

In 1999, the Legislature created s.365.172, F.S., known as the Wireless Emergency Communications Act⁴ (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, Laws of Florida

⁵ Ch. 99-203, Laws of Florida

⁶ Ch. 2003-182, Laws of Florida

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.
- 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.
- 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.
- Required 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.
- Required 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.
- Required 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 28, 2004.

February 2004, Wireless E911 Board Annual Report

According to the Board's February 2004, Annual Report, the Board received 19 reports⁷ of unreasonable delay in complying with federal Phase II E911 requirements. The Board established a subcommittee to develop recommendations addressing the various issues brought up by the industry. Based on the reports, supplemental reports, local government responses, and mini-hearings, the subcommittee determined that there was not any consistency or statewide problem causing unreasonable delays in the implementation of telecommunications facilities. The report provides the subcommittee's recommendation for each of reports.

PROPOSED CHANGES

Section 1.

Auditor General Duties

The bill amends s. 11.45, F.S. to remove paragraph (e) related to the requirement that the Auditor General annually conduct an audit of the Wireless Emergency Telephone System Fund and rennumbers paragraphs (f) through (i) as paragraphs (e) through (k).

Section 2.

Regulatory Assessment Fees

The bill amends the definition of "telecommunications company" in s. 364.02(13), F.S., to remove the provision that commercial mobile radio service providers are liable for any fees imposed pursuant to s. 364.336, F.S., which relates to the Regulatory Assessment Fees that the Public Service Commission (PSC) assesses telecommunications companies under its jurisdiction. The statement that commercial mobile radio services providers are subject to fees imposes under s. 364.336, F.S. was included in ch. 2003-32, Laws of Florida, when s. 364.02(13) was amended to include intrastate interexchange telecommunications companies in the list of what a "telecommunications company" does not include. Since the PSC does not have jurisdiction over these providers, these fees were never imposed.

Section 3.

Definitions

The bill adds definitions to the following terms in s. 365.172, F.S.:

- Administrative review-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-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 or subsequent antenna. 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 antennas. A collocation shall not be considered a modification to an existing structure which subjects the structure to a greater than building-permit review or which constitutes an impermissible modification of a nonconforming structure.

⁷ 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).

- Existing structure-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, buildings, utility structures, light poles, water towers, clock towers, bell towers, and steeples.
- Land-development regulation-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 ch. 553, F.S.
- Provider or wireless provider-a person or entity who provides service and either: 1) is subject to the requirements of the order; or 2) elects to provide wireless 911 or E911 service in this state.
- Tower-any structure designed primarily to support a wireless provider's antenna.
- Wireless communications facility-any equipment or facility used to provide service, and may include, but is not limited to antennas, 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.
- Wireless communications site-only 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 provide in association with the wireless communications facility.

Authority of E911 Board

The bill expands the authority of the Wireless E911 Board in two ways. First, it includes an independent executive director with experience in telecommunications and 911 issues in the Board's authority to hire and retain employees. Second, it gives the Board the authority to secure the services of an independent, private attorney via invitation to bid, requests for proposals, invitation to negotiate, or professional contracts for legal services already established at the Department of Management Services. At this time, the administrative functions of the Board are being performed by the State Technology Office and the Attorney General's Office provides legal counsel.

Wireless E911 Fee

The bill amends to s. 364.172(8)(a), F.S. to provide that for purposes of wireless E911 fees, state and local governments are not considered customers. This is consistent with a 1987 Attorney General's Opinion that state agencies are not authorized to pay the 911 fee imposed by counties user s. 351.171(13), F.S.

Facilitating 911 Service Implementation

The bill amends s. 365.172(11), F.S. in order to balance the public's need for E911 service with the public interest served by zoning and land development regulations. The bill applies standards to a local government's regulation of the placement, construction, or modification of wireless communications facilities.

The bill encourages collocations among wireless providers. If a collocation does not increase the height of the structure to which the antennas are attached, and consists of antennas, equipment enclosures, and ancillary facilities that are of a design and configuration consistent with all applicable restrictions or conditions applied to the first antenna placement and, if applicable, applied to the structure supporting the antennas, are only subject to building permit review and to any applicable existing permits or agreements for the property, buildings, or structures. Restrictions, conditions, permits, or agreements imposed by local government that are inconsistent with this section do not

apply to collocation. If a portion of the collocation does not meet the requirements, only that portion is subject to the local government's regulation of a first placement.

The bill provides that an existing tower, including a nonconforming tower, may be structurally modified to permit collocation or be replaced through 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.

The bill limits a local government's authority to evaluate a wireless provider's application for placement of wireless facilities to issues concerning land development and zoning. A local government may not request information, review, nor consider the provider's business need for a location, or evaluate a provider's service quality or network design unless the information relates to a specific land development or zoning issue.

The bill provides that the setback or distance separation required may not exceed the minimum distance needed to satisfy structural safety or aesthetic concerns that are protected by the setback distance or distance separation.

Local government's may exclude the placement of wireless facilities in residential areas or residential zoning districts only if the designated service can reasonably be provided to the residential area or zone in a manner consistent with the provider's network design. Exclusion from a residential area may not prohibit, or have the effect of prohibiting, the provider's service or unreasonably discriminate against providers of functionally equivalent services. If the exclusion cannot exist in a residential zone, the local government and the provider must work cooperatively to approve appropriate location and structural design in a way that is consistent with the community and the provision of the provider's service.

The local governments may only impose fees, surety, and insurance requirements on wireless providers when applying to place, construct, or modify facilities, if similar fees or requirements are imposed on other applicants seeking similar zoning, land use, or building-permit reviews. Fees for an application review by consultants or experts on behalf of a local government may only be assessed if recovery is routinely sought from other applicants seeking a similar level of review and must be reasonable.

A local government may not impose structural or construction standards on the placement, construction, or modification of wireless communications facilities beyond those adopted by the local government under ch. 553, F.S.⁸, which apply to all similar types of construction or require information on compliance with the extraordinary standards. The local government may request, but not require, that the facilities be placed, constructed, or modified, according to trade construction standards.

A local government may not require a wireless provider to provide evidence of a facility's compliance with federal regulations, except evidence of compliance with applicable Federal Aviation Administration requirements under 14 C.F.R. s. 77, as amended⁹. A local government may request evidence of proper FCC licensure or other evidence of FCC authorized spectrum use from a provider.

Requires local governments to grant or deny each properly completed application for a collocation within the normal timeframe for a similar building permit review but in no case later than 45 business days after the application is deemed properly completed.

Requires local governments to grant or deny each properly completed application for any other wireless communications facilities within the normal time frame for a similar building permit review but no later than 90 business days after the application is determined to be properly completed. The building

⁸ Ch. 533, F.S. concerns Building Construction Standards

⁹ 14 C.F.R., s. 77, relates to objects affecting navigable airspace

permit review portion of the local government review must be completed within the normal timeframe for a similar review, but no later than 45 days after the application is completed.

The bill provides that the application is deemed submitted or resubmitted on the date it is received by local government. The local government shall notify the applicant, in writing, within 20 business days after the application is initially submitted as to whether the application is properly completed and has been properly submitted. The determination shall not be deemed as an approval of the application. If the application is not completed, the notification must indicate with specificity any deficiencies in the required documents or in the content of the required documents which, if cured, make the application properly completed. Upon resubmission, the local government shall notify the applicant, in writing, within 20 business days whether the application is properly completed or if there are any remaining deficiencies.

Any deficiencies in document type or content not specified by the local government do not make an application incomplete and are waived. If a specified deficiency is not properly cured when the applicant resubmits the application to comply with the notice of deficiencies, the local government may continue to request the information until the specified deficiency is cured.

The bill prohibits local governments from imposing square footage or height limitations on equipment, enclosures, cabinets, or buildings inconsistent with the requirements for other structures in the same zoning district. This supersedes any existing limitation imposed on equipment, enclosures, cabinets, or buildings by ordinance, resolution, or land development regulation.

Except for a tower, the replacement or modification of wireless communications facilities resulting in a facility of similar, size, type, and appearance and is not visible from the outside of the site are subject to no more than a building permit review.

Any person adversely affected by a local government's action or failure to act that is inconsistent with this subsection, may, within 30 days, bring action in a court of competent jurisdiction, and the court shall consider the matter on an expedited basis.

The bill eliminates the provision allowing wireless providers to report to the Board no later than September 1, 2003; locations where it has experienced unreasonable delay in locating wireless telecommunications facilities necessary to comply with FCC Phase II requirements.

Section 4.

Wireless Emergency Telephone System Fund

The bill amends s. 365.173, F.S., relating to the Wireless Emergency Telephone System Fund. It requires any county that receives these funds to establish a fund to be exclusively used for the receipt and expenditure of revenues collected. The bill requires that the fees placed in the fund, along with any interest accrued to be used for recurring costs of operating 911 or E911 service or complying with FCC orders and rules pertaining to wireless E911 requirements. The county commissioners are to appropriate the money collected and interest earned for the required purposes and incorporate it into the annual county budget.

The bill also eliminates language in s. 364.173(2), F.S., limiting the carry forward of funds distributed to the county by the board for capital outlay, capital improvements, or equipment replacement to three successive calendar years and 30 percent of the total funds disbursed.

With the bill eliminating the requirement that the Auditor General annually audit the fund, the bill adds language to include the audit of this fund with the county's financial audits to be performed in accordance with s. 218.39, F.S. The Auditor General has recommended this change since trust funds of State agencies, including this one, are included in the biannual operational audits of State agencies, in the annual audit of State government, and that counties must comply with the Single Audit Act.

Section 5.

Use of Right-of-Way for Utilities

The bill amends s. 337.401(3)(a)1, F.S. to require municipalities and counties to exercise their zoning or land use authority to treat communications service providers in a manner that is competitively neutral and nondiscriminatory in the use of public roads and rights of way and may not require an individual license, franchise, or other agreement as prohibited by this subparagraph.

Section 6.

Effective Date

This act takes effect on July 1, 2005.

C. SECTION DIRECTORY:

Section 1. Amends s. 11.45, F.S., to remove the requirement that the Auditor General annually audit the Wireless Emergency Management Trust Fund.

Section 2. Amends s. 364.02, F.S., to remove the requirement that commercial mobile radio services providers are subject to any fees assessed under s. 364.336, F.S.¹⁰

Section 3. Amends s. 365.172, F.S., to add definitions, expand the authority of the wireless E911 board, amend the wireless fee provision, to add provisions concerning the facilitation of wireless E911 implementation.

Section 4. Amends s. 365.173, F.S., relating to the Wireless Emergency Telephone System Fund.

Section 5. Amends s. 337.401, F.S., relating to the use of right-of-way for utilities subject to regulation; permit; fees.

Section 6: This act takes effect on July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

While the bill removes any obligation that commercial mobile radio service providers have in paying Regulatory Assessment Fees imposed by the PSC, this fee has never been imposed on them; therefore there should be no impact on revenues.

2. Expenditures:

The bill allows the Board to hire an Executive Director and outside counsel. If the Board hires and Executive Director there will be salary and benefit expenditures associated with this position. There may be some cost savings with removing the requirement that the Auditor General annually audit the Wireless Emergency Telephone System Fund and incorporating the audit of this fund into other government audits.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

¹⁰ Section 364.336, F.S., is the Public Service Commission's Regulatory Assessment Fee statute.

1. Revenues:

Local governments may lose revenue if they are currently requiring wireless providers to pay higher permit fees than they are requiring other entities for other permit reviews.

2. Expenditures:

The bill exempts local governments from paying wireless E911 fees, which may provide savings to local governments. There may be some additional expenses associated with setting up a separate account for wireless E911 fees and expenses and incorporating it into the county's annual audit.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

With fewer restrictions to wireless sites, wireless providers should find it easier to site E911 facilities.

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:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES