

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Community Affairs

BILL: CS/CS/SB 1000

INTRODUCER: Community Affairs Committee; Innovation, Industry, and Technology Committee; and Senator Hutson

SUBJECT: Communications Services

DATE: March 27, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Wiehle</u>	<u>Imhof</u>	<u>IT</u>	<u>Fav/CS</u>
2.	<u>Ryon</u>	<u>Yeatman</u>	<u>CA</u>	<u>Fav/CS</u>
3.	_____	_____	<u>FT</u>	_____
4.	_____	_____	<u>AP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 1000 makes extensive changes to s. 337.401, F.S., which governs the use of public rights-of-way by providers of communications services. These changes include:

- Creating a civil cause of action for any person aggrieved by a violation of the right-of-way statute in a U.S. District Court or in any other court of competent jurisdiction for a temporary or permanent injunction and recovery of full costs and reasonable attorney fees to a prevailing party.
- Prohibiting a local government permitting authority from instituting, either expressly or de facto, a moratorium or other mechanism that would prohibit or delay permits for collocation of small wireless facilities or related poles.
- Deleting authority for a local government to require performance bonds and security funds and allowing them to require a construction bond limited to no more than 1 year after the construction is completed;
- Requiring a local government to accept a letter of credit or similar instrument issued by any financial institution authorized to do business within the U.S.;
- Allowing a provider of communications services to add a permitting authority to any existing bond, insurance policy, or other financial instrument, and requiring the authority to accept such coverage; and
- Providing additional requirements pertaining to a local government's permit registration and application process for communications services providers' use of public rights-of-way.

Additionally, the bill provides that municipalities and counties that, as of January 1, 2019, were not imposing permit fees for use of public rights-of-way by communications services providers cannot reverse this election and cannot impose such permit fees. In contrast, municipalities and counties that were imposing permit fees as of that date may continue to do so or may elect to no longer impose permit fees. The bill retains existing provisions on fees and changes to elections applicable only to this latter group.

The bill takes effect July 1, 2019.

II. Present Situation:

Communications Services Tax

Chapter 202, F.S., provides for the communication services tax (CST), including telecommunications and cable, taxed at a rate of 4.92 percent, and direct-to-home satellite, taxed at a rate of 9.07 percent.¹ A portion of the state taxes collected – including taxes collected on direct-to-home satellite service – are deposited into the General Revenue Fund and a portion is distributed to local governments.²

Local governments may also levy a local CST, which varies by jurisdiction.³ The maximum rate for municipalities or charter counties is 5.1 percent (or 4.98 percent if the municipality or charter county levies certain permit fees, which are discussed below).⁴ The maximum rate for non-charter counties is 1.6 percent.⁵ These maximum rates do not include add-ons of up to .12 percent for municipalities and charter counties or up to .24 percent for non-charter counties, which are discussed below.⁶ Further, temporary emergency rates may exceed the statutory maximum rates.⁷ The local CST does not apply to direct-to-home satellite services.⁸

Local Government Election to Impose Permit Fees for Use of Public Rights-of-Way by Communications Services Providers

Section 337.401(3)(c) and (j), F.S., allows local government to require and collect permit fees from any provider of communications services that uses or occupies municipal or county roads or rights-of-way. All fees must be reasonable and commensurate with the direct and actual cost of the regulatory activity, demonstrable, and equitable among users of the roads or rights-of-way. Fees may not: be offset against the communications services tax; include the costs of roads or rights-of-way acquisition or roads or rights-of-way rental; include any general administrative, management, or maintenance costs of the roads or rights-of-way; be based on a percentage of the value or costs associated with the work to be performed on the roads or rights-of-way; or exceed \$100.

¹ Section 202.12(1)(a) and (b), F.S.

² Section 202.18, F.S.

³ Section 202.19(1), F.S.

⁴ Section 202.19(2)(a), F.S.

⁵ Section 202.19(2)(b), F.S.

⁶ Section 202.19(2)(c), F.S.

⁷ *Id.*

⁸ Section 202.19(6), F.S.

Each local government was required to make an election on whether to charge permit fees before July 16, 2001, and the impacts on CST rates were different for municipalities and charter counties as compared to non-charter counties.

The options for a municipality or charter county were: to require and collect permit fees, but reduce its CST rate by 0.12 percent; or to elect not to charge permit fees and increase the CST rate by an amount not to exceed 0.12 percent. A municipality or charter county that did not make the required election was statutorily presumed to have elected not to require and collect permit fees.

In contrast, a non-charter county that elected to require and collect permit fees had no reduction in its CST rate, and a non-charter county that elected not to charge permit fees could increase its CST rate by an amount not to exceed a rate of 0.24 percent to replace the revenue the non-charter county would otherwise have received from permit fees for providers of communications services. A non-charter county that did not make the required election was statutorily presumed to have elected not to require and collect permit fees.

Section 337.401(3)(j), F.S., allows a local government to change a previously selected option, with no limitation on the number of times a local government makes such a change. If a municipality or charter county changes its election in order to require and collect permit fees, its CST rate would automatically be reduced by 0.12 percent plus the percentage, if any, by which the rate was previously increased due to the previous election. If a municipality or charter county changes its election in order to discontinue requiring and collecting permit fees, its CST rate could be increased by an amount not to exceed 0.24 percent.

If a non-charter county changes its election in order to require and collect permit fees, its CST rate would automatically be reduced by the percentage, if any, by which such rate was increased due to the previous election. If a non-charter county changes its election in order to discontinue requiring and collecting permit fees, its CST rate could be increased by an amount not to exceed 0.24 percent.

General Permitting for Use of Public Rights-of-Way by Communications Service Providers

Pursuant to s. 337.401, F.S., each local government that has jurisdiction and control of public roads or publicly owned rail corridors is authorized to prescribe and enforce reasonable rules or regulations with regard to the placement and maintenance of utility facilities across, on, or within the right-of-way limits of any road or publicly owned rail corridors under its jurisdiction. Each local government may authorize any person who is a resident of this state, or any corporation which is organized under the laws of this state or licensed to do business within this state, to use a right-of-way for a utility⁹ in accordance with the authority's rules or regulations. A utility may not be installed, located, or relocated within a right-of-way unless authorized by a written permit.

⁹ Section 337.401(1)(a), F.S., refers to "any electric transmission, telephone, telegraph, or other communications services lines; pole lines; poles; railways; ditches; sewers; water, heat, or gas mains; pipelines; fences; gasoline tanks and pumps; or other structures referred to in this section and in ss. 337.402, 337.403, and 337.404" as a "utility."

Permitting for Small Wireless Facilities in the Public Rights-of-Way

In 2017, the Legislature passed the Advanced Wireless Infrastructure Deployment Act (Act), which established a process by which wireless providers may place certain “small wireless facilities”¹⁰ on, under, within, or adjacent to certain utility poles or wireless support structures within public rights-of-way under the jurisdiction and control of a local government.¹¹ The Act prescribes the specific terms and conditions under which an authority¹² must process and issue permits for collocation¹³ of small wireless facilities in the public rights-of-way. The impetus for the passage of the Act was to streamline local permitting regulations in order to facilitate the deployment of fifth generation, or 5G, wireless technology upgrades. As of June 2018, 20 states had enacted “small cell” legislation that streamlines regulations to facilitate the deployment of 5G small cells.¹⁴

III. Effect of Proposed Changes:

The bill amends s. 337.401, F.S., to provide that municipalities and counties that, as of January 1, 2019, were not imposing permit fees for use of public rights-of-way by communications services providers cannot reverse this election and cannot impose such permit fees. In contrast, municipalities and counties that were imposing permit fees as of that date may continue to do so or may elect to no longer impose permit fees. The bill retains existing provisions on fees and changes to elections applicable only to this latter group. As of January 2019, three local governments – one municipality, one charter county, and one non-charter county – impose permit fees.¹⁵

Additionally, the bill makes extensive changes to s. 337.401(3) and (7), F.S., relating to the use of public rights-of-way and small and micro wireless infrastructure.¹⁶ For ease of the reader, the current law is described immediately prior to the discussion of each change proposed in the bill.

¹⁰ “Small wireless facility” is defined in s. 337.401(7)(b)10., F.S., to mean a wireless facility that meets the following qualifications:

Each antenna associated with the facility is located inside an enclosure of no more than 6 cubic feet in volume or, in the case of antennas that have exposed elements, each antenna and all of its exposed elements could fit within an enclosure of no more than 6 cubic feet in volume; and

All other wireless equipment associated with the facility is cumulatively no more than 28 cubic feet in volume. The following types of associated ancillary equipment are not included in the calculation of equipment volume: electric meters, concealment elements, telecommunications demarcation boxes, ground-based enclosures, grounding equipment, power transfer switches, cutoff switches, vertical cable runs for the connection of power and other services, and utility poles or other support structures.

¹¹ Chapter 2017-136, Laws of Fla.

¹² Section 337.401(7)(b)5., F.S. “Authority” means a county or municipality having jurisdiction and control of the rights-of-way of any public road. The term does not include the Department of Transportation.

¹³ Section 337.401(7)(b)7., F.S. “Collocation” means to install, mount, maintain, modify, operate, or replace one or more wireless facilities, on, under, within, or adjacent to a wireless support structure or utility pole.

¹⁴ National Conference of State Legislatures. Legis Brief Vol. 26, No.22: 5G: *The Future of Wireless Technology* (June 2018), available at: http://www.ncsl.org/documents/legisbriefs/2018/june/LBJune2018_SmallCell_goID32451.pdf. (last visited March 23, 2019).

¹⁵ See Florida Department of Revenue, *Florida Communications Services Tax – Historical, Current and Upcoming Local Tax Rates*, http://floridarevenue.com/taxes/Documents/cst_rate_table.xlsx (last visited March 25, 2019).

¹⁶ “Wireless facility” means equipment at a fixed location which enables wireless communications between user equipment and a communications network. The term includes radio transceivers, antennas, wires, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment. The term includes small wireless facilities.

Current Law: Current law contains a statement of legislative intent that local governments treat providers of communications services in a nondiscriminatory and competitively neutral manner.

Proposed Change: The bill requires local governments to take into account the distinct engineering, construction, operation, maintenance, public works and safety requirements of the provider's facilities when imposing rules or regulations governing the placement or maintenance of communications facilities in the public roads or rights-of-way.

Current Law: Current law allows a municipality or county to require a provider of communications services that places or seeks to place facilities in its roads or rights-of-way to register with the municipality or county, and limits the types of information that may be required in registration to identification and location information and any required proof of insurance or self-insuring status adequate to defend and cover claims.

Proposed Change: The bill provides that a municipality or county may not require registration or renewal more frequently than every 5 years, but may request that a provider submit any updates during the period if any registration information changes. The bill also prohibits a local government from requiring the provision of an inventory of communications facilities, maps, locations of such facilities or other information as a condition of registration, renewal, or for any other purpose. It does allow a local government to require as part of a permit application that the applicant identify at-grade (ground level) communications facilities within 25 feet of the proposed installation location for the placement of at grade communications facilities. The bill also prohibits: requiring a provider to pay any fee, cost, or other charge for registration or renewal; adoption or enforcement of any ordinances, regulations, or requirements as to the placement or operation of communications facilities in a right of way by a communications services provider; or imposition or collection of any tax or charge for the provision of communications services over the communications services provider's communications facilities in a right of way.

Current Law: Current law prohibits imposition of permit fees for any activity that does not require the physical disturbance of the roads or rights-of-way or does not impair access to or full use of the roads or rights-of-way.

Proposed Change: The bill adds that this prohibition includes emergency repairs of existing facilities; extensions of existing facilities for providing communications services to customers; and the placement of micro wireless facilities suspended on cables between existing poles.

Current Law: Current law requires a local government to provide to the Secretary of State notice of a proposed ordinance governing a telecommunications company placing or maintaining facilities in its roads or rights-of-way within specified times. Failure to provide the notice does not render the ordinance invalid.

“Small wireless facility” means a wireless facility for which each associated antenna associated is located inside, or could fit within, an enclosure of no more than 6 cubic feet in volume, and all other associated wireless equipment is cumulatively no more than 28 cubic feet in volume.

“Micro wireless facility” means a small wireless facility having dimensions no larger than 24 inches in length, 15 inches in width, and 12 inches in height and an exterior antenna, if any, no longer than 11 inches. s. 337.401(7)(b)12., 10., and 9., F.S., respectively.

Proposed Change: The bill requires that, if notice was not provided, the ordinance must be suspended until 30 days after the municipality or county provides the required notice.

Current Law: Current law prohibits a local government from using its authority over the placement of facilities in its roads and rights-of-way as a basis for asserting or exercising regulatory control over a provider of communications services regarding matters within the exclusive jurisdiction of the Florida Public Service Commission or the Federal Communications Commission.

Proposed Change: The bill prohibits the local government from exercising control over equipment or technology used by a provider. The bill further prohibits a local government from requiring any permit for the maintenance, repair, replacement, or upgrade of existing aerial wireline communications facilities on utility poles or attachments on utility poles by a communications service provider. A local government may, however, require a right-of-way permit for work that involves excavation, closure of a sidewalk, or closure of a vehicular lane, unless the provider is making emergency restoration or repair work to existing facilities. Additionally, the bill prohibits a local government from requiring a permit or any charge for the maintenance, repair, replacement, or upgrade of existing aerial or underground communications facilities on private property outside the public rights-of-way.

Current Law: Current law does not specify a timeframe within which local governments must process a permit application for the placement of communications facilities in the public right-of-way by a communications services provider, except with respect to the permitting of small wireless facilities.¹⁷

Proposed Change: The bill provides that all permit applications required by a local government for the placement of communications facilities must be processed consistent with the timeframes established for small wireless facilities.

Current Law: Current law states that a local government may adopt or enforce reasonable rules or regulations concerning use of its rights-of-way.

Proposed Change: The bill requires that any such rules or regulations be in writing. It also requires that a local government give providers at least 60 days advance written notice before making any changes to the rules or regulations.

Current Law: For purposes of the Advanced Wireless Infrastructure Deployment Act, the definition of “applicable codes” includes provisions on “objective design standards,” or aesthetics. The significance of this is that an authority must approve a complete application unless it does not meet the authority’s applicable codes. If these aesthetic requirements are part of applicable codes, the aesthetic requirements must be met for approval of an application.

Proposed Change: The bill transfers the aesthetic requirements from the definition of “applicable codes” to subparagraph 337.401(7)(f)6. Currently, paragraph 337.401(7)(f) allows a permitting authority to deny a proposed collocation of a small wireless facility in the public rights-of-way if

¹⁷ See s. 337.401(7)(d)7.-9., F.S., for the timeframes applicable to small wireless facilities.

the proposed collocation meets one of a list of disqualifying criteria. The addition of objective design standards means that the permitting authority may deny a proposed collocation that does not meet these standards. The statute defines the term collocation” to mean “to install, mount, maintain, modify, operate, or replace one or more wireless facilities on, under, within, or adjacent to a wireless support structure or utility pole. The term does not include the installation of a new utility pole or wireless support structure in the public rights-of-way.” Thus, a service provider would have to meet objective design standards to locate a wireless facility on or adjacent to an existing utility pole or wireless support structure, but not to install a facility on a new pole or support structure.

Current Law: The current definition of “application” means a request submitted by an applicant to an authority for a permit “to collocate small wireless facilities.”

Proposed Change: The bill adds a request for a permit “to place a new utility pole used to support a small wireless facility,” thus requiring local governments to permit new poles.

Proposed Change: The bill changes the definition of “wireless support structure” to include a “pedestal or other support structure for ground based equipment not mounted on a utility pole and less than 10 feet in height,” thus requiring a local government to permit these support structures.

Current Law: Current law prohibits an authority from prohibiting, regulating, or charging for the collocation of small wireless facilities in public rights-of-way.

Proposed Change: The bill adds to this prohibition “the installation, maintenance, modification, operation or replacement of utility poles used for the collocation of small wireless facilities,” allowing installation of a utility pole without regulation or charge.

Current Law: Current law provides that an applicant for a permit for placement of small wireless facilities may not be required to provide more information than is necessary to demonstrate the applicant’s compliance with applicable codes.

Proposed Change: The bill adds a prohibition against requiring an applicant to provide inventories, maps, or locations of communications facilities in the right-of-way other than as necessary to avoid interference with other at-grade facilities located at the specific location proposed for a small wireless facility or within 25 feet of such location.

Current Law: Current law prohibits a local government from requiring the placement of small wireless facilities on any specific utility pole or category of poles.¹⁸

Proposed Change: The bill adds additional prohibitions. Under the bill, a local government may not:

- Require a demonstration that collocation of a small wireless facility on an existing structure is not legally or technically possible as a condition for granting a permit for the collocation of a small wireless facility on a new utility pole;

¹⁸ Section 337.401(7)(d)3., F.S.

- Require compliance with an authority's provisions regarding placement of small wireless facilities or a new utility pole used to support a small wireless facility in rights-of-way under the control of the Department of Transportation;
- Require a meeting before filing an application;
- Require direct or indirect public notification or a public meeting for the placement of communication facilities in the right-of-way;
- Limit the size or configuration of a small wireless facility or any of its components, if the small wireless facility complies with the stated size limits;
- Prohibit the installation of a new utility pole used to support the collocation of a small wireless facility if the installation otherwise meets the requirements of the subsection;
- Require that any component of a small wireless facility be placed underground; or
- Require that any existing communication facility be placed underground.

Current Law: Current law provides for review, approval, and denial of an application for a permit to use rights-of-way.

Proposed Change: The bill provides that the availability of any subsequent review by the permitting authority does not bar review of a denial in a court of competent jurisdiction.

Current Law: Current law allows a local government to require insurance, indemnification, performance bonds, or security funds.

Proposed Change: The bill deletes performance bonds and security funds and allows requiring a construction bond limited to no more than one year after the construction is completed. It also requires the local government to accept a letter of credit or similar financial instrument issued by any financial institution that is authorized to do business within the United States. The bill states that a provider of communications services may add an authority to any existing bond, insurance policy, or other relevant financial instrument, and the authority is required to accept such proof of coverage without any conditions. Finally, an authority may not require a communications services provider to indemnify it for liabilities not caused by the provider, including liabilities arising from the authority's negligence, gross negligence, or willful conduct.

Current Law: Current law contains size limitations for micro wireless facilities.

Proposed Change: The bill provides that an authority may require an initial letter from or on behalf of a provider attesting that the micro wireless facility dimensions comply with the limits but after that filing, the authority may not require any additional filing or other information as long as the provider is deploying the same or a substantially similar or smaller size micro wireless facility equipment.

Proposed Change: The bill prohibits a local government permitting authority from instituting, either expressly or de facto, a moratorium, zoning-in-progress, or other mechanism that would prohibit or delay the filing, receiving, or processing of registrations, applications, or issuing of permits or other approvals for the collocation of small wireless facilities or the installation, modification, or replacement of utility poles used to support the collocation of small wireless facilities.

Proposed Change: The bill creates a cause of action for any person aggrieved by a violation of the right-of-way statute. Any such person may bring a civil action in a U.S. District Court or any other court of competent jurisdiction and the court may grant temporary or permanent injunctions to prevent or restrain violations and direct the recovery of full costs, including awarding reasonable attorney fees, to the party who prevails.

The bill also amends s. 202.20, F.S., to conform a cross-reference.

The bill takes effect on July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The Revenue Estimating Conference has not yet determined the impact of the bill in its current form.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill removes the ability for a local government to elect to charge limited permit fees for communications services providers' use of public rights-of-way. However, local governments that do not impose such permit fees retain the authority to increase its local

CST rate by a capped percentage to replace the revenue it would have otherwise received from such fees.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 202.20 and 337.401..

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Community Affairs on March 26, 2019:

The committee substitute makes the following changes to the bill:

- Removes the decrease in the state communications services tax rate.
- Allows a city or county to request updates from a communications services provider during the 5-year registration period if any registration information changes.
- Provides that if a city or county fails to notify the Department of State of a proposed ordinance governing a telecommunications providers' use of public roads or rights-of-ways, the ordinance must be suspended until 30 days after the city or county provides the required notice.
- Clarifies that a city or county may not require a permit for the maintenance, repair, replacement, or upgrade of existing aerial wireline communications facilities on utility poles or related attachments.
- Clarifies provisions prohibiting a city or county from requiring a permit or fee for the maintenance, repair, replacement, or upgrade of existing aerial or underground communications facilities on private property.
- Allows the prevailing party in a civil suit for a violation of the right-of-way statute to recover full costs, including reasonable attorney fees. The bill allowed this for the *aggrieved* prevailing party only.

CS by Innovation, Industry, and Technology on March 12, 2019:

The committee substitute revises the bill's provisions on to the election on permit fees and communications services taxes rates. Municipalities and counties that, as of January 1, 2019, were not imposing permit fees cannot reverse this election and cannot impose permit fees. In contrast, municipalities and counties that were imposing permit fees as of that date may continue to do so or may elect to no longer impose permit fees. The bill retains existing provisions on fees and changes to elections applicable only to this latter group.

The committee substitute adds to the bill extensive provisions on use of rights-of-way, including provisions on small and micro wireless infrastructure, including:

- Creating a civil cause of action for any person aggrieved by a violation of the right-of-way statute in a U.S. District Court or any other court of competent jurisdiction for a temporary or permanent injunction and recovery of full costs and reasonable attorney fees to a prevailing aggrieved party;
- Prohibiting a local government permitting authority from instituting, either expressly or de facto, a moratorium or other mechanism that would prohibit or delay permits for collocation of small wireless facilities or related poles;
- Deleting authority for a local government to require performance bonds and security funds and allowing them to require a construction bond limited to no more than one year after the construction is completed;
- Requiring a local government to accept a letter of credit or similar instrument issued by any financial institution authorized to do business within the U.S.;
- Allowing a provider of communications services to add a permitting authority to any existing bond, insurance policy, or other financial instrument, and requiring the authority to accept such coverage.

Finally, under the committee substitute, a local government may not:

- Prohibit, regulate, or charge for the installation, maintenance, modification, operation or replacement of utility poles used for the collocation of small wireless facilities;
- Require a demonstration that collocation of a small wireless facility on an existing structure is not legally or technically possible as a condition for granting a permit for collocation on a new utility pole;
- Require compliance with an authority's law regarding placement of small wireless facilities or a new utility pole used to support a small wireless facility in rights-of-way not controlled by the authority;
- Require a meeting before filing an application;
- Require direct or indirect public notification or a public meeting for the placement of communication facilities in the right-of-way;
- Limit the size or configuration of a small wireless facility or any of its components, if the small wireless facility complies with existing size limits;
- Require that any component of a small wireless facility be placed underground; or
- Require that any existing communication facility be placed underground.

B. Amendments:

None.