

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1239 Broadband Internet Infrastructure  
**SPONSOR(S):** Ways & Means Committee, Tomkow and others  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1592

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Tourism, Infrastructure & Energy Subcommittee	15 Y, 1 N	Willson	Keating
2) Ways & Means Committee	15 Y, 1 N, As CS	Berg	Aldridge
3) Commerce Committee			

### SUMMARY ANALYSIS

Federal law provides that a state or local government may not prohibit the ability of any entity to provide telecommunications services. Federal law also recognizes the authority of state and local governments to manage the public right-of-way (ROW) and to require fair and reasonable compensation from telecommunications service providers, on a competitively neutral and nondiscriminatory basis, for the use of such ROW.

Federal law requires investor-owned utilities to provide nondiscriminatory access for attachments to their poles, conduit, or ROW by cable television systems and telecommunications carriers, and authorizes the Federal Communications Commission (FCC) to regulate the rates, terms, and conditions of such attachments in the absence of parallel state regulation.

Most attachments of cable and telecommunications carrier facilities to utility poles owned by a municipal electric utility are not currently regulated at the state or federal level.

The bill requires and provides a procedure for access by broadband providers for attachments to poles owned and operated by municipal electric utilities. It provides for the adoption of rates, terms, and conditions for such access consistent with federal requirements for pole attachments. Each municipal electric utility must:

- Make available all records necessary to calculate the pole attachment rate pursuant to the current FCC formula used to calculate attachment rates for cable service providers.
- Rearrange, expand, replace, or reengineer any pole if necessary to accommodate the new attachment.
- If replacement is required, the municipal utility must complete all necessary work within 90 days of a request and may be reimbursed only the cost associated with advancing the retirement of the existing pole.

The bill provides that existing pole attachment agreements must be renegotiated at the request of either party in order to bring the agreement in compliance with the bill. The bill specifies that disputes over pole attachment agreements must be adjudicated in circuit court, and that the effect of a court's determination is retroactive to the date of the request to renegotiate.

The Revenue Estimating Conference has estimated the potential revenue impacts of the bill as amended. Staff estimates that the bill has no impact on state or local government revenues.

The bill takes effect on July 1, 2021.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Current Situation

##### *Regulation of Pole Attachments*

The term pole attachment refers to the process by which communications companies can collocate communications infrastructure on existing electric utility poles. Utility poles are divided into various “spaces” for specific uses, and different vertical portions of the pole serve different functions.<sup>1</sup> Utility poles often accommodate equipment used to provide a variety of services, including electric power, telephone, cable, wireline broadband, and wireless, which benefits the public by minimizing “unnecessary and costly duplication of plant for all pole users.”<sup>2</sup>

The bottom of the pole generally is unusable for most types of attachments, although providers of wireless services and facilities sometimes attach equipment associated with distributed antenna systems and other small wireless facilities to the portion of the pole near the ground.<sup>3</sup> Above that, the lower usable space on a pole (known as the “communications space”) houses low-voltage communications equipment, including fiber, coaxial cable, and copper wiring.<sup>4</sup> The topmost portion of the pole, the “electric space,” houses high-voltage electrical equipment.<sup>5</sup> Historically, communications equipment attachers used only the communications space; however, mobile wireless providers increasingly are seeking access to areas above the communications space, including the electric space, to attach pole-top small wireless facilities. When a new attacher seeks access to a pole, it is necessary to evaluate whether adding the attachment will be safe and whether there is room for it. In many cases, existing attachments must be moved to make room for the new attachment. In some cases, it is necessary to install a larger pole to accommodate a new attachment.<sup>6</sup>

Federal law provides that a state or local government may not prohibit the ability of any entity to provide telecommunications services.<sup>7</sup> Federal law also recognizes the authority of state and local governments to manage the public right-of-way (ROW) and to require fair and reasonable compensation from telecommunication providers, on a competitively neutral and nondiscriminatory basis, for the use of such ROW.<sup>8</sup>

Congress began regulating pole attachments<sup>9</sup> in 1978.<sup>10</sup> The Telecommunications Act (Act) of 1996<sup>11</sup> expanded pole attachment rights to telecommunications<sup>12</sup> carriers. The Act requires utilities<sup>13</sup> to provide nondiscriminatory access to cable television systems and telecommunications carriers. The Act also

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<sup>1</sup> See Florida Public Service Commission, What’s on a Utility Pole?

<http://www.psc.state.fl.us/ConsumerAssistance/UtilityPole> (last visited Mar. 17, 2021).

<sup>2</sup> S. REP. NO. 95-580, at 13 (1977), as reprinted in 1978 U.S.C.C.A.N. 109, 121.

<sup>3</sup> See EEI Oct. 3, 2017 Wireline *Ex Parte* Letter at Attach. *Pole Attachments: Safety and Reliability*; Crown Castle Wireline NPRM Comments at 5.

<sup>4</sup> PSC, *supra*.

<sup>5</sup> PSC, *supra*.

<sup>6</sup> FCC-CIRC1808-03 at 4-5.

<sup>7</sup> 47 U.S.C. § 253(a).

<sup>8</sup> 47 U.S.C. § 253(c). states that “Nothing in this section affects 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.”

<sup>9</sup> 47 U.S.C. § 224(a)(4), defines “pole attachment” as “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.”

<sup>10</sup> The Pole Attachment Act of 1978 granted utility pole access to cable companies and was designed to promote utility competition and service to the public. Communications Act Amendments of 1978, Pub. L. No. 95-234. (Feb. 21, 1978).

<sup>11</sup> Telecommunications Act of 1996, Pub. L.A. No. 104-104, 110 Stat. 56 (1996).

<sup>12</sup> The term “telecommunications” means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received. 47 U.S.C. § 153(50).

<sup>13</sup> 47 U.S.C. § 224(a)(1), defines “utility” as “any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.”

authorizes the Federal Communications Commission<sup>14</sup> (FCC) to regulate the rates, terms, and conditions of attachments by cable television operators to the poles, conduit, or ROW owned or controlled by utilities in the absence of parallel state regulation.<sup>15</sup> The Act withheld from FCC jurisdiction the authority to regulate attachments where the utility is a railroad, cooperatively organized, or owned by a government entity.<sup>16</sup>

In April 2011, the FCC approved a pole attachment order which established a revised telecommunications formula and included make-ready<sup>17</sup> provisions which provided a benchmark for pole attachment rates and access.<sup>18</sup>

In September 2018, the FCC issued an order<sup>19</sup> which preempted state and local laws and agreements, including those related to pole attachments, to remove regulatory barriers that would inhibit the deployment of “small cell” infrastructure necessary to support new wireless broadband services. The order set uniform rates and regulations for attachments on poles owned and controlled by publicly-owned electric utilities.<sup>20</sup> The order provided that state or local fees charged to mobile service providers for deploying small cell sites violate federal law unless they:

- Are a reasonable approximation of the state or local government’s costs,
- Only factor in costs that are “objectively reasonable,” and
- Are no higher than fees charged to similarly situated competitors.<sup>21</sup>

Except for small cell wireless facilities, attachments of cable and telecommunications carrier facilities to utility poles owned by a municipal electric utility are not currently regulated by at the state or federal level.

### **Effect of the Bill**

#### *Broadband Service Infrastructure*

The bill creates s. 364.0137, F.S., to provide requirements for broadband provider attachments to municipal electric utility poles.

The bill provides legislative findings that just, reasonable, and nondiscriminatory rates, terms, and condition for access and use of municipal electric utility poles by broadband service providers is essential for the deployment of broadband service to the residents of the state.

The bill defines the following terms:

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<sup>14</sup> The FCC regulates interstate and international communications by radio, television, wire, satellite and cable in all 50 states, the District of Columbia and U.S. territories. An independent U.S. government agency overseen by Congress, the FCC is the United States' primary authority for communications law, regulation and technological innovation. FCC, *What We Do*, <https://www.fcc.gov/about-fcc/what-we-do> (last visited Mar 13, 2021).

<sup>15</sup> 47 U.S.C. § 224.

<sup>16</sup> *In the Matter of Implementation of Section 224 of the Act A Nat'l Broadband Plan for Our Future*, 26 F.C.C. Rcd. 5240, 5245–46 (2011)

<sup>17</sup> “Make-ready” generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional attachments. FCC, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, Order on Reconsideration, 14 FCC Rcd 18049, 18056 n.50 (1999).

<sup>18</sup> FCC, *In the Matter of A National Broadband Plan for Our Future* (GN Docket No. 09-51) Implementation of Section 224 of the Act (WC Docket No. 07-245) Report And Order And Order On Reconsideration, FCC 11-50. (April 7, 2011).

<sup>19</sup> FCC, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Report and Order*, 33 FCC Rcd 9088 (14), FCC-18-133. See also Congressional Research Service, *Overview of Legal Challenges to the FCC’s 5G Order on Small Cell Siting* (Feb. 25, 2019) The Order’s discussion of preemption begins by interpreting the Telecommunication Act’s two relevant preemption provisions: Sections 253 and 332(c)(7). Subject to certain exceptions, these sections preempt state and local requirements that “prohibit or have the effect of prohibiting the ability of any entity” to provide “telecommunications” or “personal wireless services.” The Order interprets these provisions as imposing a “material inhibition” standard, concluding that a law “ha[s] the effect of prohibiting” a telecommunications entity from providing service if it “materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”

<sup>20</sup> American Public Power Association, *Preserving the Municipal Exemption from Federal Pole Attachment Regulations*, at 2. <https://www.publicpower.org/system/files/documents/January%202021%20-%20Federal%20Pole%20Attachment%20Regulations.pdf> (last visited Mar. 17, 2021).

<sup>21</sup> CRS, *supra*, at 2-3. The order also identifies specific fee limits that are presumptively allowed under federal law. For non-recurring fees, such as up-front applications for small cell site installations, localities may charge up to \$500, subject to certain exceptions. For recurring fees, such as access fees, localities may charge up to \$270 per year. Under certain circumstances, higher fees may be charged due to local cost variances.

- “Attachment” means any attachment to a utility pole or structure, duct, conduit, or right-of-way owned or controlled by a municipal electric utility.
- “Broadband provider” means a person who provides broadband service, and includes a person who provides or offers additional services to the public in addition to broadband service.
- “Broadband service” means a service that provides high-speed access to the Internet at a rate of at least 25 megabits per second in the downstream direction and at least 3 megabits per second in the upstream direction.
- “Utility pole” means a pole owned or controlled by a municipal electric utility which is used in whole or in part for electric distribution.

The bill provides that to promote the deployment of broadband service to all residents, each municipal utility must provide broadband providers with access to any utility pole it owns or operates and adopt rates, terms and conditions for such access that are consistent with 47 U.S.C. s. 224 and any FCC regulations and decisions adopted as of July 1, 2021. The rates, terms, and conditions must be nondiscriminatory, just, and reasonable and may not favor a pole owner, owner, or affiliate of the pole owner.

A municipal electric utility may not discriminate between providers and any attaching entity, regardless of the services furnished. The annual recurring rate established by the utility may not exceed the rate calculated pursuant to the cable service rate formula established by 47 U.S.C. s. 224(d) and FCC regulations and decisions in existence on July 1, 2021. The utility must maintain the records necessary to calculate the charges, including costs, description, and depreciation of the utility poles, including any ancillary poles.

The bill requires a municipal utility to rearrange or otherwise reengineer any utility pole if necessary to accommodate the broadband provider’s new attachment. If the utility pole must be replaced to accommodate the attachment, the utility may only charge the broadband provider its actual and reasonable costs of “advancing the retirement of the existing utility pole.” The costs must be measured by all of the following:

- Net book value of the existing utility pole;
- Incremental cost of installing a utility pole with greater capacity than the existing pole; and
- Other incremental costs that may not include the cost of a pole that the municipal utility would have installed at the same location.

A municipal utility may not prohibit a broadband provider from using boxing techniques, extension arms, attachments below existing attachments where space is unavailable above the existing attachments, temporary attachments, or other methods or equipment, provided that they comply with the National Electric Safety Code, or any other applicable safety codes.

For any pole replacement, the bill requires the municipal utility to complete all work necessary to accommodate the broadband provider’s attachments within 90 days after receipt of an attachment request from the provider. The municipal utility may not require the provider to comply with any attachment specifications that exceed the National Electric Safety Code or any applicable codes.

A municipal electric utility or a broadband provider may submit a written request to negotiate an agreement or to amend, modify, or renew an existing agreement on attachments to conform to the provisions of the bill. The parties must negotiate in good faith for at least 60 days, and after that time, either party may petition the circuit court to determine rates, terms and conditions of the agreements consistent with the provisions of the bill, which include application of current federal law, such as the FCC-approved formula for calculating cable service attachment rates. The court must enter a decision within 180 days after the filing of the petition. The court’s decision is retroactive to apply to existing attachments and to the date of the written request to negotiate and applies to the continuing terms of all existing attachments installed before the written request.

Between the date of the written request and the court’s decision:

- The terms of any existing agreement on attachments apply, subject to true-up, to put the parties in the position they would have been if the court's decision had been in effect on the date of the negotiation request.
- In absence of an existing agreement, unless the parties agree otherwise, the court, within 30 days following the petition for determination, is required to establish interim rates and conditions, subject to a true-up, to put the parties in the position they would have been if the court's decision had been in effect on the date of the negotiation request.

A utility or provider may seek available remedies at law or equity for violations of the provisions of the bill. The court is required to give effect to the provisions of 47 U.S.C. s. 224 and FCC regulations and decisions in existence on July 1, 2021, in making its decision.

The bill takes effect on July 1, 2021.

#### B. SECTION DIRECTORY:

Section 1 Provides a short title.

Section 2 Creates s. 364.0137, F.S., relating to broadband service infrastructure.

Section 3 Provides an effective date.

### II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

None.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

None.

##### 2. Expenditures:

The bill appears to have an indeterminate negative impact on local government expenditures associated with the renegotiation and possible litigation of pole attachment rates, terms, and conditions. The bill may also negatively impact local governments that are required to replace poles sooner than planned.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Broadband service providers may see an adjustment in the pole attachment fees paid to municipal electric utilities for installation of attachments to the utilities' poles.

#### D. FISCAL COMMENTS:

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Line 257 refers to the “commission’s determination” but should read “court’s determination.”

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On April 8, 2021, The Ways & Means Committee adopted an amendment that removed provisions in the bill that created a sales tax exemption for equipment purchased, leased, or sold in Florida for use by providers of telecommunications services and providers of Internet access services.

This analysis is drafted to the bill as amended.