

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/HB 1567 Utility and Communication Service Poles

SPONSOR(S): Commerce Committee and Tourism, Infrastructure & Energy Subcommittee, DiCeglie and others

TIED BILLS: IDEN./SIM. **BILLS:** CS/SB 1944

FINAL HOUSE FLOOR ACTION: 114 Y's

3 N's

GOVERNOR'S ACTION: Approved

SUMMARY ANALYSIS

CS/CS/HB 1567 passed the House on April 28, 2021, as CS/SB 1944.

“Pole attachment” refers to the process by which telecommunications companies can collocate telecommunications infrastructure on existing electric utility poles. Telecommunications companies and electric utilities have an established system of utility poles to carry the wires that move their resources from provider to the consumer. However, telecommunications companies typically own relatively few poles so they often lease space from electric utility pole owners. Historically, rates, terms, and conditions for attachments to municipal and cooperative utility poles have been established through private contracts.

Federal law broadly preempts the regulation of telecommunications services, including pole attachments. Federal regulations apply only to attachments made to poles owned by investor-owned electric utilities (IOUs); municipal and cooperative electric utilities are specifically exempted. Federal law allows states to exercise reverse preemption over the Federal Communications Commission's (FCC) jurisdiction over pole attachments.

The bill requires the Florida Public Service Commission (PSC) to regulate utility pole attachments in Florida, taking over the role currently performed by the FCC. The bill requires the PSC to hear and resolve complaints concerning rates, charges, terms, conditions, voluntary agreements, or any denial of access relative to pole attachments. The bill provides that FCC precedent is not binding upon the PSC if a party demonstrates that an alternative cost-based rate is just and reasonable and in the public interest.

The bill defines “redundant pole” and requires that attaching entities remove their pole attachments from a redundant pole within 180 days of a written request by the pole owner. Under certain circumstances, the pole owner may transfer or relocate the pole attachment to a new pole at the noncompliant attaching entity's expense, unless the pole attachments are owned by an electric utility. Upon petition by a pole owner, the bill authorizes the PSC to issue orders enforcing these provisions.

The bill also requires the PSC to regulate the safety, maintenance, and storm restoration of certain telecommunications infrastructure. The bill provides authority to the PSC to examine the books and records of communications services providers in order to perform this function. The bill also authorizes the PSC to impose monetary penalties and adopt rules to implement these provisions.

The PSC indicates a fiscal impact to implement the provisions of the bill. However, it is expected this can be absorbed within existing resources. See *Fiscal Analysis & Economic Impact Statement*.

The bill was approved by the Governor on June 29, 2021, ch. 2021-191, L.O.F., and became effective on that date.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Current Situation

Regulation of Pole Attachments

First deployed in America in 1844 to extend telegraph service, utility poles provide the scaffolding for the technology of the twenty-first century. In the mid-nineteenth and early twentieth centuries, many states adopted laws granting rights-of-way (ROW) to construct utility poles, wires, and facilities to transmit electricity and communications signals. First telegraph, then telephone, electricity, cable, wireless, and Internet Service Providers have sought to attach facilities to wooden, and later steel or composite, utility poles.¹

The term pole attachment refers to the process by which communications companies can collocate communications infrastructure on existing electric utility poles. This reduces the number of poles that must be built to accommodate utility services, while reducing costs to users of both services by allowing providers to share costs. Rules governing pole attachments seek to balance the desire to maximize value for users of both electric and communications services with concerns unique to electric utility poles, such as safety and reliability.² The space requested for a pole attachment is typically one foot.

Pole attachments, originally by mutual agreement but later by federal statute and regulation, provide non-pole-owning cable and telecommunication service providers (e.g. cable TV, local exchange carriers) with access to a utility's distribution poles, conduits, and ROW for:

- Installing fiber, coaxial cable or wires, and other equipment;
- Building an interconnected network; and
- Reaching customers.³

Congress began regulating pole attachments⁴ in 1978.⁵ The Telecommunications Act of 1996⁶ expanded pole attachment rights to telecommunications⁷ carriers. The Act requires utilities⁸ to provide nondiscriminatory access to cable television systems and telecommunications carriers. The Act also authorizes the Federal Communications Commission⁹ (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.¹⁰ The Legislation withheld from FCC jurisdiction the authority to regulate attachments where the utility is a railroad, cooperatively organized,

¹ Catherine J.K. Sandoval, *Contested Places, Utility Pole Spaces: A Competition and Safety Framework for Analyzing Utility Pole Association Rules, Roles, and Risks*, 69 *Cath. U. L. Rev.* 473, 474–75 (2020).

² American Public Power Association, *Issue Brief: Preserving the Municipal Exemption from Federal Pole Attachment Regulations* (Jan. 2021) <https://www.publicpower.org/policy/preserving-municipal-exemption-federal-pole-attachment-regulations> (last visited Mar. 13, 2021).

³ Edison Electric Institute, Pole Attachments 101, <https://ecfsapi.fcc.gov/file/7020708245.pdf> (last visited Mar. 13, 2021).

⁴ 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.”

⁵ 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).

⁶ Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).

⁷ 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).

⁸ 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.”

⁹ 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).

¹⁰ 47 U.S.C. § 224.

or owned by a government entity.¹¹ Thus, federal pole attachment regulations apply only to investor-owned electric utilities (IOUs). Municipal and cooperative electric utilities are specifically exempted from federal pole attachment regulations.

The 1996 Act permits utilities to deny access where there is insufficient capacity and for reasons of safety, reliability or generally applicable engineering purposes. In addition to establishing a right of access, the Act provides a rate methodology for “attachments used by telecommunications carriers to provide telecommunications services”¹² in addition to the existing methodology for attachments “used by a cable television system solely to provide cable service.”¹³

Federal law broadly preempts the regulation of telecommunications services.¹⁴ However, federal law allows states to exercise reverse preemption over the FCC’s jurisdiction of communications infrastructure access,¹⁵ meaning that once a state adopts its own utility pole access rules, the FCC loses jurisdiction over pole attachments to the extent that the state regulates such matters.¹⁶

Federal law specifically recognizes the authority of state and local governments to manage the public ROW, and to require fair and reasonable compensation for the use of such ROW.¹⁷ The law also provides that states may adopt, on a competitively neutral basis, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”¹⁸

Pursuant to section 224(c) of the Telecommunications Act of 1996¹⁹, each state that regulates the rates, terms, and conditions for pole attachments must certify to the FCC that:

- It regulates such rates, terms, and conditions; and
- In so regulating such rates, terms, and conditions, the state has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services provided by the pole owners.

Furthermore, a state is not considered to regulate the rates, terms, and conditions for pole attachments:

- Unless the state has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments; and
- With respect to any individual matter, unless the state takes final action on a complaint regarding such matter:
 - Within 180 days after the complaint is filed with the state, or
 - Within the applicable period prescribed for such final action in such rules and regulations of the state, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

¹¹ *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)

¹² 47 U.S.C. § 224(e).

¹³ 47 U.S.C. § 224(d).

¹⁴ “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” 47 U.S.C. § 253(a).

¹⁵ 47 U.S.C. § 224(c)(1).

¹⁶ Catherine J.K. Sandoval, *Contested Places, Utility Pole Spaces: A Competition and Safety Framework for Analyzing Utility Pole Association Rules, Roles, and Risks*, 69 Cath. U. L. Rev. 473, 486–87 (2020).

¹⁷ 47 U.S.C. § 253(c).

¹⁸ 47 U.S.C. § 253.

¹⁹ 47 U.S.C. § 224(c)

Regulation of Utility Infrastructure in Florida

The Florida Public Service Commission (“PSC” or “commission”) is an arm of the legislative branch of government.²⁰ The role of the PSC is to ensure that Florida's consumers receive some of their most essential services – electric, natural gas, telephone, water, and wastewater – in a safe, affordable, and reliable manner.²¹ In doing so, the PSC exercises regulatory authority over utilities in one or more of three key areas: rate base/economic regulation; competitive market oversight; and monitoring of safety, reliability, and service issues.²²

The PSC monitors the safety and reliability of the electric power grid²³ and may order the addition or repair of infrastructure as necessary.²⁴ Additionally, the PSC has broad jurisdiction over the rates and service of investor-owned electric utilities (IOUs) in Florida. However, the PSC does not regulate pole attachments or provide construction and reliability standards relating to pole attachments. Additionally, the PSC generally does not regulate providers of communications services,²⁵ cable television operators, local exchange carriers, or streetlight fixtures.

Telecommunications carriers in Florida are subject to limited regulation under ch. 364, F.S. During the 2011 legislative session House Bill CS/CS/HB 1231, the “Regulatory Reform Act” (Act), was passed and signed into law by the Governor, effective July 1, 2011. Under the Act, the Legislature eliminated most of the PSC’s retail oversight authority over the telecommunications wireline companies, yet maintained the PSC’s authority over wholesale intercarrier issues. The Act eliminated most of the retail regulation of local exchange telecommunications services by the PSC, including the elimination of rate caps on all retail telecommunications services, elimination of telecommunications-related consumer protection and assistance duties of the PSC, and elimination of the PSC’s remaining oversight of telecommunications service quality.²⁶

Effect of the Bill

The bill requires the PSC to regulate pole attachments in Florida, taking over the role currently performed by the FCC.

The bill defines the following terms:

- "Attaching entity" means a person that is a local exchange carrier, a public utility,²⁷ a

²⁰ s. 350.001, F.S.

²¹ FLA. PUBLIC SERVICE COMMISSION, *The PSC’s Role*, <http://www.psc.state.fl.us> (last visited Feb. 26, 2021).

²² *Id.* The PSC regulates five investor-owned electric companies, eight investor-owned natural gas utilities, and 151 investor-owned water and/or wastewater utilities. While the PSC does not fully regulate municipal or cooperative electric utilities, the Commission does have jurisdiction, with regard to rate structure, territorial boundaries, bulk power supply operations, and planning, over 35 municipally owned electric systems and 18 rural electric cooperatives. The PSC has jurisdiction, with regard to territorial boundaries and safety, over 27 municipally owned natural gas utilities and 4 gas districts, and also exercises safety authority over all electric and natural gas systems operating in the state. FLA. PUBLIC SERVICE COMMISSION, 2020 ANNUAL REPORT 14 (2020), <http://www.psc.state.fl.us/Files/PDF/Publications/Reports/General/Annualreports/2020.pdf>. (last visited Feb. 28, 2021).

²³ S. 366.04(5) & (6), F.S.

²⁴ S. 366.05(1) & (8), F.S.

²⁵ Section 202.11(1), F.S., defines “Communications services” as “the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals, including video services, to a point, or between or among points, by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of the protocol used for such transmission or conveyance. The term includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether such service is referred to as voice-over-Internet-protocol services or is classified by the Federal Communications Commission as enhanced or value-added. The term does not include: Information services. Installation or maintenance of wiring or equipment on a customer’s premises. The sale or rental of tangible personal property. The sale of advertising, including, but not limited to, directory advertising. Bad check charges. Late payment charges. Billing and collection services. Internet access service, electronic mail service, electronic bulletin board service, or similar online computer services.”

²⁶ PSC, *Local Competition* <http://www.psc.state.fl.us/Telecommunication/TelecomLocalCompetition> (last visited Mar. 13, 2021).

²⁷ Section 366.02(1), F.S., defines “Public utility” as “every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state; but the term “public utility” does not include either a cooperative now or hereafter organized and existing under the Rural Electric Cooperative Law of the state; a municipality or any agency thereof; any dependent or independent special natural gas

communications services provider, a broadband service provider, or a cable television operator who owns or controls pole attachments.

- "Communications services provider" means an entity providing communications services as defined in s. 202.11(1), F.S.
- "Pole" means a pole used for electric distribution service, streetlights, communications services, local exchange services, or cable television services that is owned in whole or in part by a pole owner, and does not include a pole used solely to support wireless communications services facilities or a pole with no electrical facilities attached.
- "Pole attachment" means any attachment by a public utility, local exchange carrier, communications services provider, broadband provider, or cable television operator to a pole, duct, conduit, or right-of-way owned or controlled by a pole owner.
- "Pole owner" means a local exchange carrier, a public utility, a communications services provider, or a cable television operator that owns a pole.
- "Redundant pole" means a pole owned or controlled by a pole owner which is:
 - Near or adjacent to a new pole which is intended to replace the old pole from which some or all of the pole attachments have not been removed and transferred to the new pole;
 - Left standing after the pole owner has relocated its facilities to underground but on which pole attachments of other attaching entities remain; or
 - Left standing after a pole owner's attachments have been removed from that route or location to accommodate a new route or design for the delivery of service.

Regulation of Pole Attachments

The bill requires the PSC to regulate and enforce rates, charges, terms, and conditions for pole attachments, and to ensure that they are just and reasonable. The bill authorizes the PSC to regulate attachments by a cable television system or provider of telecommunications service to investor-owned electric utility poles, attachments to streetlight fixtures, attachments to poles owned by a public utility, or attachments to poles owned by a communications services provider.

The bill provides that the PSC's authority to regulate such matters includes, but is not limited to, the state regulatory authority provided under federal law. Additionally, the bill requires the PSC to consider the interests of the subscribers and users of the services offered through pole attachments, as well as the interests of the consumers of any pole owner providing such attachments, when developing rules to implement its authority over pole attachments.

The bill requires the PSC to hear and resolve complaints concerning rates, charges, terms, conditions, voluntary agreements, or any denial of access relative to pole attachments. The bill specifies that a party's right to nondiscriminatory access to a pole is identical to the rights afforded under 47 U.S.C. s. 224(f)(1), and that a pole owner may deny access to its poles on a nondiscriminatory basis when there is insufficient capacity, for reasons of safety and reliability, and when required by generally applicable engineering purposes. The bill requires a pole owner to consider relevant construction and reliability standards approved by the PSC when evaluating capacity, safety, reliability, and engineering requirements.

The bill provides that FCC precedent is not binding upon the PSC. However, the bill requires the PSC to apply the decisions and orders of the FCC and related appellate court decisions when determining just and reasonable pole attachment rates, terms and conditions unless a pole owner or attaching entity

district; any natural gas transmission pipeline company making only sales or transportation delivery of natural gas at wholesale and to direct industrial consumers; any entity selling or arranging for sales of natural gas which neither owns nor operates natural gas transmission or distribution facilities within the state; or a person supplying liquefied petroleum gas, in either liquid or gaseous form, irrespective of the method of distribution or delivery, or owning or operating facilities beyond the outlet of a meter through which natural gas is supplied for compression and delivery into motor vehicle fuel tanks or other transportation containers, unless such person also supplies electricity or manufactured or natural gas."

establishes by competent substantial evidence that an alternative cost-of-service based pole attachment rate is just and reasonable and in the public interest.

To help provide precedent on the establishment of pole attachment rates and guide negotiations toward voluntary pole attachment agreements, the bill authorizes any pole owner or attaching entity to participate in the first four formal administrative proceedings conducted to determine pole attachment rates. After the fourth such formal administrative proceeding is concluded by final order, parties to subsequent pole attachment rate proceedings are limited to the specific pole owner and pole attaching entities involved in and directly affected by the specific pole attachment rate.

The bill specifies that it may not be construed to:

- Prevent a party from entering into a voluntary agreement authorizing a pole owner to remove an attaching entity's pole attachment.
- Impair the contract rights of a party to a valid pole attachment agreement in existence before the effective date of the bill.

By January 1, 2022, the bill requires the PSC to propose procedural rules to administer and implement these provisions, and to provide certification to the FCC upon adoption of such rules.

Regulation of Telecommunications Infrastructure

The bill requires the PSC to regulate the safety, vegetation management, repair, replacement, maintenance, relocation, emergency response, and storm restoration requirements for poles of communication services providers. The bill authorizes the PSC to access the books and records of communications services providers to the extent necessary to perform its functions and to exercise this authority.

The bill requires the PSC, by April 1, 2022, to propose rules to administer and implement these provisions and to establish monetary penalties for any communication services provider that fails to comply with such rules.

Redundant Poles

The bill requires pole owners to provide at least 180 calendar days' electronic or written advance notice to affected attaching entities of major hardening projects the purpose of which is to replace poles to ensure the poles meet extreme wind loading requirements. This notice must include:

- The scope of the major hardening project, to the extent determined, the locations of the affected poles, the expected start and completion dates of the major hardening project, and
- The date, time, and location of a field meeting for the pole owner and attaching entities to review and discuss the planned major hardening project details, including the types of replacement poles to be used. The field meeting shall occur no sooner than 15 calendar days after the date of the notice, and no later than 60 calendar days after the notice, and shall at a minimum include sufficient information to enable the attaching entity to locate the affected poles and to identify the owner of any facilities attached to the poles.

The bill requires that attaching entities remove their pole attachments from a redundant pole within 180 days of an electronic or written notice from the pole owner, and authorizes a pole owner to use a joint use notification software program to accomplish such removal notice.

Absent a force majeure event or other good cause agreed to by the parties or as determined by the PSC, the pole owner may transfer or relocate the pole attachment to the new pole at the noncompliant attaching entity's expense, unless the pole attachments are owned by an electric utility.

Relating to unused pole attachments, the bill:

- Authorizes the pole owner to remove the pole attachment at the noncompliant attaching entity's expense, unless the PSC finds a force majeure event or other good cause for noncompliance.
- Authorizes the pole owner to sell or dispose of the pole attachment.

An attaching entity must submit payment to the pole owner within 60 days after receipt of the pole owner's invoice for transfer, relocation, sale, or removal of a pole attachment. A pole owner may seek to enforce its right to payment in circuit court and is entitled to prejudgment interest at the prevailing statutory rate and reasonable attorney's fees and court costs. Upon adequate written notice by the pole owner, the noncompliant attaching entity must indemnify, defend, and hold harmless the pole owner and its directors, officers, agents and employees from and against all liability, except to the extent of any finding of negligence or willful misconduct, including attorneys' fees and litigation costs, arising in connection with the removal, transfer, sale, or disposal of the pole attachment from a redundant pole by the pole owner.

The bill authorizes both pole owners and attaching entities to petition the PSC to enforce the bill's provisions on redundant poles, except for those provisions that expressly relate to circuit court jurisdiction. The bill allows pole owners to seek relief in circuit court to enforce their right to payment for expenses incurred in transferring, relocating, or disposing of noncompliant pole attachments.

The bill takes effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None. The bill does not authorize the PSC to impose new or existing regulatory assessment fees on communications services providers to account for its new regulatory responsibilities over these providers.²⁸ However, the bill requires the PSC to impose monetary penalties on entities that do not comply with the provisions of the bill. Current law²⁹ authorizes the PSC to impose a penalty up to \$5,000 per occurrence, per day.

2. Expenditures:

The bill is likely to have a fiscal impact on the PSC's Regulatory Trust Fund, as the PSC is directed to adopt rules and regulate new matters, including pole attachments and reliability of communications services infrastructure.

The PSC estimates that up to 13 new positions (FTE) and a total of \$925,566 (\$186,123 nonrecurring) in additional budget authority will be needed to implement the bill.³⁰ A breakdown of the positions and funding is provided below.

Category	Amount
Salaries and Benefits (13 FTE)	\$656,919
- 6 Public Utility Analysts	
- 4 Engineer Specialists	
- 3 Attorneys	
Expense Package: 13 new FTE	\$82,524

²⁸ See s. 364.336, F.S.

²⁹ S. 366.095, F.S.

³⁰ Email from Peter Queirolo, Budget Analyst, Public Service Commission, RE: PSC Explanation of the Fiscal Impact of HB 1567 (Mar. 22, 2021).

Total Recurring Costs	\$739,443
Expense package: 13 new FTE	\$50,635
Other Operating Expenses	\$135,488
- 2 new vehicles	
- Hardware/Application Development	
Total Nonrecurring Costs	\$186,123
Total Costs for FY 2021-22	\$925,566

The PSC currently has a total of 33 vacant positions (FTE), with 22 FTE vacant over 180 days. The annualized amount of these vacancies is approximately \$1.3 million. Current vacancies and historical reversions could offset the need for additional funding for the PSC during FY 2021-22. Therefore, due to the high number of vacant positions and annual reversions averaging approximately \$1.4 million in budget authority over the last three fiscal years, the PSC will likely be able to handle the workload associated with the bill within existing resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Depending on the PSC's implementation of its authority over pole attachments under the bill, the financial and legal responsibilities of parties to pole attachment arrangements in Florida could change substantially.

The PSC's adoption of rules and implementation of this new authority may involve litigation between the affected parties.

The bill will impose new regulatory expenses on communications service providers that own poles in the state.

D. FISCAL COMMENTS:

None.