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MEMORANDUM

To: Chairman Olson and Members of the Senate Committee on Utilities

From: Matt Sterling, Assistant Revisor of Statutes

Date: 02/08/2016

RE: Senate Bill 401

SB 401 would enact new provisions concerning the siting of wireless telecommunications infrastructure and the permit application process between wireless service providers and municipalities.

Subsection (a) of the bill details the public policy goals of the legislature concerning the permitting and construction of wireless communications facilities.

Subsection (b) of the bill contains a number of definitions used in the bill. Some of the most frequently used definitions include:

> "Authority" which means any governing body, board, agency, office or commission of a municipality, county or the state that is authorized by law to make legislative, quasi-judicial or administrative decisions concerning an application. "Authority" shall not include any court having jurisdiction over land use, planning or zoning decisions made by an authority.
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> "Applicant" which means any person or entity that submits an application for placement of a wireless facility that is engaged in the business of providing wireless telecommunications services or the wireless telecommunications infrastructure required for wireless telecommunications services.

Subsection (c) of the bill prohibits an authority from charging any kind of application fee or consulting fee concerning the submission, review, processing and approval of an application if the same fee is not required for similar types of commercial development within the authority's jurisdiction. An authority would only be permitted to assess fees or charges for the actual costs incurred that relate to the granting or processing of an application and the fees would have to be based on market rates and be reasonably related in time to the occurrence of such costs. Fees would exclude certain costs such as travel fees for third parties and any dispute in fees would require the authority to demonstrate why they fee was related to costs of the application. Lastly, the fees would be capped at $500 for a collocation or small cell facility application and $1,000 for a new wireless support structure or substantial modification application.

Subsection (d) of the bill would prohibit an authority from charging any rental, license or other fee to locate a wireless facility or wireless support structure on any public right-of-way controlled by the authority, if the authority does not charge other utility [illegible] the public right-of-way. Any fee that the authority does assess must be [illegible]

SENATE UTILITIES COMMITTEE
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ATTACHMENT # 1

Subsection (d) would further give a wireless services provider the right to construct, maintain and operate wireless support structures, small cell wireless facilities or distributed antenna systems near the public right-of-way. Such facilities shall be so constructed and maintained so as not to obstruct or hinder the usual travel or public safety on such public right-of-ways or obstruct the legal use of such public right-of-ways by other utilities. An authority would be required to manage the public right-of-way in a competitively neutral manner. The authority could require a provider to repair damage caused by the provider to the public right-of-way. If the provider failed to repair the public right-of-way, the authority could have the repairs performed and assess the provider the costs of the repair as long as such costs were substantiated to the satisfaction of the provider.

Subsection (e) allows an authority to enter into a lease with an applicant for the applicant's use of public lands, buildings and facilities. If entering into a lease for use of publicly owned lands, an authority would be required to offer leases for at least 20 years and at market rates. If the applicant and the authority are unable to agree on the applicable market rate for the use or lease of public land, then the market rate will be determined by a panel of three appraisers. The panel will consist of one appraiser appointed by each party and a third appraiser selected by the two appointed appraisers.

The appraisal process would require that each appraiser will independently appraise the appropriate market rate and set the rate at the mean between the highest and lowest market rates among all three independent appraisals, unless the mean between the highest and lowest appraisals is greater than or less than 10% of the appraisal of the third appraiser, in which case the third appraisal will determine the rate for the lease. The appraisal process must be concluded within 150 calendar days from the date the applicant first proposes a lease rate to the authority. Each party pays the cost of the party's own appointed appraiser, and the parties would share the cost of the third appraiser. The provisions of subsection (e) would not apply to public rights-of-way governed by subsection (d).

Subsection (f) of the bill imposes a number of restrictions on an authority in the consideration of every application. These restrictions would prohibit an authority from:

(1) Requiring an applicant to submit information about the applicant's designed service, customer demand for service or quality of the applicant's service to or from a particular area or site;

(2) requiring information about the specific need for the wireless support structure;

(3) evaluating an application based on the availability of other potential locations for the placement of wireless support structures or wireless facilities;

(4) dictating the type of wireless facilities, infrastructure or technology to be used by the applicant;

(5) requiring the removal of existing wireless support structures or wireless facilities as a condition for approval of an application;

(6) imposing any restrictions with respect to objects in navigable airspace that are greater than any restrictions imposed by the federal aviation administration;

(7) establishing or enforcing regulations or procedures for radio frequency signal strength or the adequacy of service quality;

(8) imposing any surety requirements to ensure that abandoned or unused facilities can be removed, unless the authority imposes similar requirements on other permits for other types of commercial development or land uses;

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(9) creating a preference on the basis of the ownership of any property, structure or tower when promulgating rules or procedures for siting wireless facilities or for evaluating applications;
(10) imposing any requirements or obligations regarding the presentation, appearance or function of the wireless facilities and equipment;
(11) imposing any requirements that an applicant purchase, subscribe to, use or employ facilities, networks or services owned, provided or operated by an authority;
(12) imposing environmental testing, sampling or monitoring requirements that exceed federal law;
(13) imposing any compliance measures for radio frequency emissions or exposure from wireless facilities that already comply with federal communications commission rules for radio frequency;
(14) rejecting a collocation application or modification application based on perceived or alleged environmental effects of radio frequency emissions or exposure;
(15) prohibiting the placement of emergency power systems that comply with federal and state environmental requirements;
(16) conditioning the approval of an application based on the applicant's agreement to permit any wireless facilities provided or operated by an authority to be placed or collocated with the applicant's wireless support structure;
(17) imposing a setback requirement for a wireless support structure that is different from a requirement that is imposed on other types of commercial structures;
(18) prohibiting the provision of personal wireless services or personal wireless service facilities or the ability of any entity to provide any service in support of personal wireless service facilities; or
(19) limiting the duration of the approval of an application, except that construction of the approved structure or facilities shall commence within two years of final approval and shall be diligently pursued to completion.

Subsection (f) of the bill allows an applicant for a small cell network involving multiple individual small cell facilities within the jurisdiction of a single authority to file a consolidated application and receive a single permit for the work done for a small cell network instead of filing separate applications for each individual small cell facility.

Subsection (g) requires that an authority make a final decision on an application within 150 days for a new wireless support structure and within 90 days for a substantial modification to an existing wireless support structure or base station. The authority would have to provide a written explanation of a denial of an application. If no action is taken within the 90 and 150 day requirements, the applications would be deemed approved. Any party aggrieved by the final action of an authority could bring an action for review in a court of competent jurisdiction.

Subsection (h) prohibits an authority from instituting any moratorium on the filing, consideration or approval of applications, permitting or the construction of new wireless support structures, substantial modifications of wireless support structures or collocations.

Subsection (i) of the bill provides that the authority would retain zoning, land use, planning, and permitting authority, to the extent it is not restricted by the bill, but would not have any jurisdiction over systems located in an interior structure or located on privately-owned property.

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