

ONE HUNDRED SIXTH LEGISLATURE - FIRST SESSION - 2019
COMMITTEE STATEMENT
LB184

Hearing Date: Monday February 04, 2019
Committee On: Transportation and Telecommunications
Introducer: Friesen
One Liner: Adopt the Small Wireless Facilities Deployment Act

Roll Call Vote - Final Committee Action:
Advanced to General File with amendment(s)

Vote Results:
Aye: 7 Senators Albrecht, Bostelman, DeBoer, Friesen, Geist, Hilgers, Hughes
Nay: 1 Senator Cavanaugh
Absent:
Present Not Voting:

Oral Testimony:

Proponents:

Senator Curt Friesen
David Tate
Patrick Fucik
Stephanie Cassioppi
Michael Bagley
Stacey Briggs
Coby Mach
Arturo Chang
Beth Cooley
Eric Carstenson
Mary Ridder

Representing:

Introducer
AT&T
Sprint
U.S. Cellular
Verizon
T-Mobile
Lincoln Independent Business Assoc
Wireless Infrastructure Assoc
CTIA
NE Telecommunications Assoc
NE Public Service Commission

Opponents:

Lash Chaffin
David Young
Julia Plucker
Karla Rupiper
Tom Mumgaard
Alan Thelen
Brent Clark
Chris Dibbern
Eric Hellriegel
Shelley Sahling-Zart

Representing:

League of NE Municipalities
City of Lincoln
NE Cable Communications Assoc
City of Papillion
Papillion & United Cities of Sarpy County
City of Omaha
City of Grand Island
NE Municipal Power Pool
City of Kearney
Lincoln Electric System

Neutral:

Elle Hansen

Representing:

self

Summary of purpose and/or changes:

This bill would create the Small Wireless Facilities Deployment Act. Following is an explanation of key provisions in the

bill.

Section 2. The summarized legislative findings indicate there is a need for statewide uniformity in the deployment of wireless communications facilities that those facilities, are critical to the state's interest, and that permitting, construction, maintenance, and operation of those facilities are a matter of statewide concern and interest.

Section 4 through Section 31. Includes defined terms. Key terms include:

Authority (Section 8)-means the State of Nebraska or any agency, county, city, village, or other political subdivision, except as excluded in the Act. Authority does not include public power suppliers, rural public power suppliers, or state courts having jurisdiction over an authority.

Collocate or collocation (Section 10)-means to install, mount, maintain, modify, operate, or replace wireless facilities on or adjacent to a wireless support structure or utility pole.

Communications service provider (Section 11)-means a cable operator, a provider of information service, or a telecommunications carrier, which includes a wireless provider.

Fee (Section 13)-means a one-time, nonrecurring charge.

Public power supplier (Section 19)-means a public power district or any other governmental entity providing electric service, except that it does not include a municipality, a municipal electric utility or system, or a rural public power supplier.

Rate (Section 20)-means a recurring charge.

Rural public power supplier (Section 22)-means a public power district, a public power and irrigation district, an electric cooperative, or an electric membership association that does not provide electric service to any city of the metropolitan, primary, or first class.

Small wireless facility (Section 23)-means a wireless facility that the antenna fits, or could fit, inside an enclosure containing no more than six cubic feet in volume, and all other equipment associated with the structure is cumulatively no more than twenty-eight feet in volume.

Wireless facility (Section 26)-means equipment at a fixed location that enables wireless communication between user equipment and a communications network. It includes small wireless facilities, but does not include the structure upon which equipment is collocated or coaxial or fiber-optic cable that is not directly associated with a particular antenna.

Wireless support structure (Section 31)-means a structure such as a guyed or self-supporting tower, billboard, building, or other structure designed to support or capable of supporting wireless facilities, but does not include a utility pole.

Section 32-this section applies only to activities of a wireless provider within the right-of-way (ROW) to deploy small wireless facilities and associated utility poles.

Subsection (2) prohibits authorities from entering into exclusive agreements for the use of the ROW.

Subsection (3) caps rates and fees as provided in Section 35 if the authority charges other entities for the use of the ROW, although the authority may refrain from charging any rate to a wireless provider.

Subsection (4) gives wireless providers the right, as a permitted use not subject to zoning review or approval, to collocate small wireless facilities and install, maintain, modify, operate, and replace utility poles along, across, upon, and under the right-of-way.

Subsection (5) provides limits on the size of new or modified poles, and provides that small wireless facilities may extend no more than ten feet above an existing utility pole in place as of the effective date of the act. For small wireless facilities on a new utility pole, they could not extend above the height permitted for a new utility pole. For utility poles that exceed these height limits, the wireless provider would have the authority to collocate on the pole or to replace the pole, subject to zoning regulations.

Subsection (6) gives wireless providers authority to replace decorative poles when necessary to collocate a small wireless facility.

Subsection (7) relates to historic districts and the powers of an authority. An authority could require certain design or concealment measures, but they could not have the effect of prohibiting a wireless provider's technology.

Subsection (8) states that the authority shall be competitively neutral in its administration and regulation related to the management of the right-of-way with regard to other users.

Subsection (9) provides powers for the authority to require repairs for damage to the right-of-way by the wireless provider, and to charge costs to the wireless provider if repairs are not made.

Section 33 applies to permitting (a) of small wireless facilities inside or outside the right-of-way as specified in Subsection (3); and (b) of the installation, modification, and replacement of utility poles by a wireless provider within the right-of-way.

Subsection (2) states that except as provided in the act, an authority may not prohibit, regulate, or charge for the collocation of small wireless facilities.

Subsection (3) provides that small wireless facilities shall be classified as permitted uses and not subject to zoning review or approval if they are collocated in the right-of-way in any zone or outside the right-of-way in property not zoned and used exclusively for single family residential use. If they are located in an airport hazard area, they shall comply with any regulations governing such areas.

Subsection (4) provides that authorities may require permits for an applicant to collocate a small wireless facility or to install a utility pole. Such permits shall be of general applicability and shall not apply exclusively to wireless facilities. Authorities shall not (a) require applicants to perform services or provide goods unrelated to the permit; (b) require applicants to provide more information than communications providers who are not wireless carriers; (c) require placement of wireless facilities on a specific utility pole, but may propose a technically feasible alternative; or (d) require minimum horizontal separation distances for placement of small wireless facilities. An authority may require (e) an applicant to include an attestation that the facility will be operational within one year after the permit issuance date, unless extended by joint agreement or by lack of commercial power to the site.

Subsection (4) (f) requires the authority to notify the applicant within ten days in writing whether the application is complete. If the application is incomplete, the authority shall identify the missing information in writing. The processing deadline in Subsection (4) (g) is tolled from the time the authority sends notice of incompleteness to the time applicant provides the missing information.

Subsection (4) (g) states the application shall be deemed approved if the authority fails to approve or deny the application within ninety days after receipt, unless extended for thirty days upon mutual agreement.

Subsection (4) (h) sets out the bases for denial of an application. It could be denied for (i) interference with traffic control equipment; (ii) interference with air or land transportation or pedestrians; (iii) ADA compliance; (iv) spacing requirements of general application adopted by ordinance; (v) failure to comply with applicable codes, if they are of general applicability and do not apply exclusively to wireless facilities; and (vi) designates the location of a new utility pole within seven feet in any direction of an electrical conductor, unless the wireless provider obtains the written consent of the public power supplier that owns or manages the electrical conductor.

Subsection (4) (i) states the authority shall document the basis for the denial, and provides the ability for the applicant to cure the deficiency without resubmitting the application.

Subsection (4) (j) allows applicants to file a consolidated application for multiple small wireless facilities within a single authority. Denial of one or more facilities in a batch of applications would not be the basis for denying the consolidated application as a whole. The authority could (i) allow the applicant, at the applicant's discretion, to file a single set of documents that apply to all the applicant's small wireless facilities; and (ii) render a decision in a single administrative proceeding.

Subsection (4) (k) provides that approval of the application authorizes the applicant to (i) begin installation or collocation, which shall be completed within one year; and (ii) operate and maintain the facilities and poles covered under the permit for a period not less than ten years, renewable for another ten years as long as the provisions of Subsection (4) (h) are not being violated.

Subsection (4) (l) states that an authority shall not institute a moratorium on filing, receiving, or processing applications or issuing permits.

Subsection (5) (a) relates to activities that occur above, across, under, or upon a state or federal highway. It provides those activities shall be subject to the rules and regulations, guidance documents, and the usual and customary permit requirements of the State of Nebraska and Department of Transportation (DOT). Those requirements could include location and design review, liability and automobile insurance, indemnification of the DOT from liability, protection of public safety and property interests, and compliance with federal requirements.

Subsection (5) (b) provides that traffic signal utility poles and traffic control devices owned by DOT shall not be used for collocation under the Act. Highway lighting poles could be used if (i) there are insufficient reasonable alternatives; (ii) the facilities could be safely installed; and (iii) the facilities will not violate reasonable wind, ice, weight, and seismic load requirements on the poles.

Subsection (5) (c) provides that the facility owners that collocate on state poles assume the risk of loss or damage to

the property, unless the loss is incurred because of DOT negligence.

Subsection (5) (d) provides that any collocation shall come at no cost to DOT, unless otherwise agreed to in advance.

Subsection (5) (e) provides that DOT may set and collect a reasonable application fee and reasonable occupancy fee for the collocation.

Subsection (5) (f) states that if future maintenance or construction of a state highway by DOT requires the moving or relocation of facilities, it shall be the responsibility of the owner at the owner's expense.

Subsection (6) provides that an authority shall not require an application for routine maintenance, replacement of small wireless facilities that are substantially similar, or the installation of micro-wireless facilities that are strung on cables between utility poles. An authority may require a permit to work within the right-of-way.

Subsection (7) provides that any small wireless facility that is not operated for continuous period of twelve months, except in special circumstances, will be considered abandoned and the owner must remove the facility within ninety days upon notice from the authority, unless cured within ninety days.

Section 34 applies to activities of the wireless provider within the right-of-way.

Subsection (2) provides that a person owning, managing, or controlling authority poles in the right-of-way may not enter into an exclusive arrangement with any person for the right to attach to those poles.

Subsection (3) states that an authority shall allow collocation as provided in Section 33.

Subsection (4) states that the rates as provided in Section 35 for collocation shall be nondiscriminatory regardless of the services provided by the collocating person.

Subsections (5) (a)-(d) relate to requirements for make-ready work.

Subsection (5) (a) relates to requirements for nondiscriminatory rates for make-ready work.

Subsection (5)(b) relates to the requirement for the authority to make a good faith estimate for make-ready work within ninety days of receipt of a completed application, and that the work be completed within sixty days of written acceptance of the estimate by the applicant. An authority may require pole replacement only if it demonstrates that collocation would make the authority pole structurally unsound.

Subsection (5)(c) provides that the authority shall not require more make-ready work than needed, and that fees shall not include work to repair pre-existing or prior damage.

Subsection (5) (d) provides a definition of make-ready work.

Section 35 relates to fees and charges.

Subsection (1) limits an authority from requiring a wireless provider to pay any rate, fee or compensation for the right to use or occupy a right-of-way for collocation of small wireless facilities or installation, maintenance, modification, operation, and replacement of utility poles, other than expressly authorized by Section 86-704 or this act.

Subsection (2) sets out the limitation for application fees.

Subsection (2)(a) states application fees may be charged by an authority only if such fee is required for similar types of commercial development or construction.

Subsection (2) (b) states no application fee shall be assessed if costs to be recovered by the application fee are already being recovered by an existing fee.

Subsection (2) (c) states an application fee may not recover travel expenses for a third party for its review of applications or reimbursement of third party fees or fees charged on a contingency basis or a result-based arrangement.

Subsection (2) (d) states that an application fee for collocation shall be limited to the cost of granting a building permit. The application fees for collocation of small wireless facilities on existing or replacement poles shall not exceed one hundred dollars each for the first five small wireless facilities on the same application and fifty dollars for each additional small wireless facility on the same application.

Subsection (2)(e) states the application fees for the installation, modification, or replacement of a utility pole and the collocation of an associated small wireless facility that are permitted uses pursuant to Section 31 shall not exceed two hundred fifty dollars.

Subsection (3) states the rate (recurring charge) for collocation of a small wireless facility to an authority pole in the right-of-way shall not exceed twenty dollars per pole per year.

Section 36 provides that nothing in the act shall be interpreted to allow any entity to provide services regulated under 47 U.S.C. Sections 521 to 573 (CATV), or to impose any new requirements on cable operators.

Section 37 provides that authorities may continue to maintain zoning, land use, and planning and permitting authority, except as provided in the act. It provides that no authority shall have or exercise any jurisdiction or authority over the design, engineering, construction, installation, or operation of a small wireless facility located in an interior structure or upon the site of any campus, stadium, or athletic facility not owned or controlled by the authority, other than to comply with applicable codes. Authorities shall evaluate structure classification for wireless support structures under the standard of the American National Standards Institute found in ANSI/TIA-222.

Section 38 provides that an authority may adopt an ordinance with terms that comply with the act. If a compliant ordinance is not adopted, wireless providers may proceed under the act. Agreements between authorities and providers pursuant to the act are public-private agreements, and matters of statewide concern. An agreement or ordinance that does not fully comply with the act shall apply only to facilities and utility poles that became operational or were installed before the effective date of the act. It provides that prior agreements or ordinances may not be renewed, extended, or made to apply to any other small wireless facility unless it is fully modified to fully comply with the act. In the absence of such agreement or ordinance, small wireless facilities and utility poles that became operational or were constructed prior to the effective date of the act may remain installed and be operated pursuant to the provisions of the act. An agreement or ordinance that becomes operational after the effective date of this act is invalid and unenforceable, except as provided in Subsection (2) of Section 38. In the event of an invalid and unenforceable agreement or ordinance, small wireless facilities and utility poles may be installed and operated in the right-of-way or become operational pursuant to provisions of the act.

Section 39 provides that a court of competent jurisdiction shall have jurisdiction to determine all disputes arising under the act. Pending resolution of disputes, the person controlling authority poles shall allow the collocating person to collocate on its poles at an annual rate of no more than twenty dollars with rates to be reconciled upon final resolution of the dispute. Complaints shall be resolved not later than one hundred eighty days after a complaint or petition is filed.

Section 40 provides that the Act does not apply to the University of Nebraska system, the Nebraska state college system, or the community college system.

Section 41 states that a public power supplier shall not be required to allow the collocation of facilities on utility poles owned, operated, or managed by the supplier, except pursuant to a negotiated pole attachment agreement. The annual pole attachment rate shall be fair, reasonable, and nondiscriminatory, cost-based, and set by the board of the public power supplier. Also, except for findings and declarations set forth in the act, the Act shall not apply to public power suppliers or to the collocation of facilities on utility poles owned, operated, or managed by the public power supplier.

Explanation of amendments:

The committee considered and adopted an amendment which accomplishes the following:

The amendment substitutes for the bill and makes the following changes. It amends intent language (Section 1) and the language of defined terms and adds four new definitions. Defined terms that were significantly amended include "Application" (Section 7) which provides for a written request for collocation on an existing utility pole or wireless support structure or for a permit for approval for installation, modification, or replacement of a utility pole to support the installation of a small wireless facility; "Collocate" (Section 10) which would not include installation of a new utility pole or new wireless support structure; "Historic District" (Section 17) which references the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas in federal law; "Permit" (Section 20) which adds clarifying language; "Public Power Supplier" (Section 22) which now includes a municipal electric utility or a rural public power supplier; "Small Wireless Facility" (Section 26) which reduces the allowable size of antennas from 6 cubic feet to 3 cubic feet and adds new criteria relating to height of structures that mounting of facilities can occur, and provisions relating to antenna registration, tribal lands, and exposure to radio frequency radiation; "Utility Pole" (Section 28) which are poles only in the right-of-way (ROW); "Wireless Facility" (Section 29) to clarify that wireline backhaul facilities are not included in the definition; "Wireless Infrastructure Provider" (Section 30) technical amendment; and Wireless Services (Section 32) to

include services using licensed or unlicensed spectrum, including the use of Wi-Fi.

Defined terms that are new include "Communications Facility" (Section 11) which means equipment and network components used by service providers to provide communications services; "Communications Network" (Section 12); "Communications Service" (Section 13) which provides uniformity with the definition of Communications Service Provider (Section 14); and "Wireline Backhaul Facility" (Section 35) which means an underground or above-ground facility used to transport communications services from a wireless facility to a communications network.

Changes in Section 36 amend certain provisions of original Section 32 and apply to activities of a wireless provider within the ROW to deploy small wireless facilities and associated utility poles. It adds language to subsection (3) that an authority may only charge a wireless provider on a nondiscriminatory basis the rate or fee provided in Section 39 (formerly Section 35 in the original bill). Subsection (5) provides that the maximum height of a new or modified utility pole or new wireless facility shall not exceed either 50 feet or exceed by more than 5 feet the height of an existing utility pole located within 500 feet in the same ROW. It gives the authority the sole discretion to allow taller facilities or poles. Subsection (6) provides that an applicant may request approval from the authority to replace a decorative pole. Subsection (7) contains new language strengthening an authority's discretion to require design or concealment measures within a historic district. Subsection (8) strengthens an authority's ability to require wireless providers to repair damages to the ROW caused by the provider, and requires the provider to return the ROW to equal or better condition within 14 days of written notice to make repairs. If not done within that time frame, the authority may do the work and charge the provider the reasonable, documented cost of the repairs. In the case of an immediate threat to life, safety, or to prevent serious injury, the authority may do the work and charge the provider.

Changes in Section 37 amend certain provisions of original Section 33, and apply to (a) permitting of small wireless facilities inside the ROW as specified in subsection (3); and (b) permitting of the installation, modification, and replacement of utility poles by a wireless provider within the ROW. Subsection (3)-(a) to (c) is new language relating to provider risk of loss to facilities in the ROW, costs of construction or repair of facilities or poles, and costs of future maintenance to facilities in the ROW. The change in the provision in (5) (b) allows an authority to reserve space on authority poles. Subsection (5) (c) requires an applicant to provide additional information to the authority if it is directly related to the impairment of wireless service in the immediate area of a proposed wireless facility. Subsection (5) (f) provides an attestation requirement from the provider to assure that a proposed wireless location will be operational within 9 months of the later of the permit issuance date or the time of completion of make-ready work. If a delay is caused by the lack of commercial power or communications transport, the applicant could have an extension of up to 9 additional months. Subsection (5) (g) increases the time from 10 to 20 days for an authority to notify an applicant that the application is complete. The processing deadline would restart upon the first finding of incompleteness. A subsequent review would be limited to areas specifically designated as incomplete unless material changes were made by the applicant. Subsequent findings of incompleteness would toll the deadline. Subsection (5) (h) allows the authority to extend the deadline for a period of 10 business days by notifying the applicant in advance before the day that an approval or denial is due. Subsection (5) (i) is new language that provides an applicant does not have a property right or the authority to infringe upon the rights of others who may own or have interests in the ROW, a utility easement or other privately owned property. Subsection (5) (j)-(vi) is new language relating to denials of permit applications that requires applicants to comply with an authority's aesthetic requirements. Subsection (5) (l) would allow an applicant to apply for up to 30 consolidated applications for small wireless facilities within a single authority if the population within the authority exceeds 50,000, and up to 5 applications in authorities with less than a population of 50,000. Subsection (5) (m) provides that a permit is good for at least 5 years, with the ability to extend for an equivalent time. The original bill had a minimum 10-year permit and extension. Subsection (5) (o) is new language stating that nothing in the Act shall be interpreted to allow any entity to provide communication services without compliance with all laws or be interpreted to authorize the collocation, installation, placement, maintenance, or operation of any communication facility, including a wireline backhaul facility, other than a small wireless facility, on a utility pole in the ROW. The change in subsection (6) (a) clarifies provisions relating to deployment of wireless infrastructure on state-owned poles, including decorative poles, or wireless support structures. Language relating to "fees, rates, and deadlines" would be added to the list of categories subject to rules and regulations, guidance documents, and permitting requirements of the State and Nebraska Department of Transportation (NDOT). It also adds language that nothing in the subsection impacts the application and effect of federal law. Changes to subsections (6) (b), (c), and (d) add decorative poles to those provisions relating to

collocation on state lighting poles and violations of weight loads, assumption of risk, and costs to the NDOT. Language is added in subsection (6) (e) that NDOT shall adopt a uniform and nondiscriminatory system for setting fees, rates, terms, and conditions for make-ready work. Subsection (6) (g) is new language clarifying that the Act does not prevent NDOT from imposing its usual requirements for deployment of wireless facilities that are not small wireless facilities. The change in subsection (7) adds the language "permit or other approval or charge fees or rates" to the prohibition on authorities requiring applications for routine maintenance of wireless facilities, replacement of wireless facilities with similar equipment, or installation, placement, maintenance, operation, or replacement of facilities strung on cables between existing utility poles. Subsection (8) relates to abandonment of small wireless facilities and requires the owner to notify the authority of such abandonment and remove the facility. It is considered abandoned if not operated for a continuous period of 90 days, which is changed from 12 months in the original bill.

Prior Section 38 relating to ordinances is deleted.

New Section 38 relates to activities of a wireless provider within the ROW. It allows authorities to enter into exclusive arrangements for management of pole attachments, which person would be subject to the requirements of the Act. It provides that rates, fees, terms, and conditions shall reimburse all reasonable costs incurred by an authority. Authorities would be required to make good faith estimates for make-ready work required within 120 days of the application (was 90 in original bill) and provides that the work shall be completed within 90 days (was 60 in original bill). Subsection (5) (c) allows expenses for reasonable consultant fees to be included in fees for make-ready work.

Section 39 provides that an authority, except as provided in the Act or specifically authorized by state law, may not impose or collect a compensation, fee, or rate on a wireless service provider. An authority that charges occupation taxes shall not charge a wireless service provider an additional amount for the use of the ROW. If the authority does not charge the wireless provider an occupation tax, it may charge a rate of \$250 per facility or a fee equal to the occupation tax charged under sections 14-109, 15-203, 16-205, or 17-525. The application fee for collocation is changed from a maximum of \$100 for up to 5 collocations to a maximum of \$500 for 5, with an additional \$100 for facilities on the same application. Only one application fee may be charged for one site in the case of co-applicants. Other application fees in the amendment are not changed from the original bill.

Section 41 contains new language relating to limitations of an authority to impose new taxes, fees, or rates on communications service providers authorized to operate in a ROW over the provider's communications facilities in the ROW, adopt or enforce any regulations or requirements on the placement or operation of communications facilities in the ROW, or regulate any communications services.

Section 43 is a section exempting certain entities from the provisions of the Act, and the amendment adds University of Nebraska system "affiliates" to the exemption for the University of Nebraska.

Curt Friesen, Chairperson