SENATE BILL REPORT
SB 5711

As of February 8, 2017

Title: An act relating to telecommunications services.

Brief Description: Concerning telecommunications services.

Sponsors: Senators Ericksen, Hobbs, Honeyford and Palumbo.

Brief History:
Committee Activity: Energy, Environment & Telecommunications: 2/08/17.

Brief Summary of Bill

- Provides a site-specific charge for small cell facility installed on a new structure in the right-of-way.
- Requires cities and towns to: (1) authorize the installation of small cell facilities on city or town owned structures located outside the right-of-way; (2) allow service providers to place small cell facilities and networks on owned city or town owned facilities or on poles owned by a service provider located on the right-of way; and (3) provide service providers with access for attachments of small cell facilities.
- Provides requirements for local utilities for pole attachments that address: (1) access to facilities, which also addresses capacity, terms for attachments, notice; and timelines for applications; (2) contractors to perform surveys and make-ready work; (3) modifying facilities and replacing poles, including assignment of costs; and (4) determining rates for attachments.
- Authorizes binding arbitration for disputes of pole attachment agreements.
- Revises the purpose of the state Universal Communication Services program from basic telecommunications to communications services in Washington.

SENATE COMMITTEE ON ENERGY, ENVIRONMENT & TELECOMMUNICATIONS

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This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background: Site-Specific Charges for Using Municipal Rights-of-Way. The authority of cities and towns to require personal wireless services providers to pay franchise fees or other fees or charges for the use of the right-of-way is limited. A municipality may not generally impose fees for the use of a right-of-way by a personal wireless service company; however, the following site-specific charges are allowed if specified in an agreement between the municipality and company for (1) the placement of new structures, (2) the placement of replacement structures when the replacement is necessary for the installation or attachment of wireless facilities, or (3) the placement of personal wireless facilities on structures owned by the municipality. A municipality may charge a fee to cover actual administrative costs for approving a permit, inspecting plans or preparation of a state environmental review plan.

A personal wireless service company may seek binding arbitration if a municipality and the company cannot agree on site-specific charges. Personal wireless services are commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services, as defined by federal laws and regulations.

Municipal Permitting Authority. Cities and towns may require service providers to obtain master permits and use permits for installing, maintaining, repairing, or removing facilities for telecommunications services. However, a city or town may not require a master permit from a service provider with a franchise for use of a right-of-way. Cities and towns must have written procedures for issuing master permits. Denials of master permits must be supported by substantial evidence contained in a written record.

Local governments may allow a provider of a small cell network to file a consolidated application and receive a single permit for the interrelated facilities that comprise the network within a jurisdiction, instead of filing separate applications for each individual small cell facility.

A small cell network is a collection of interrelated small cell facilities designed to deliver personal wireless services, while a small cell facility is a wireless service facility that meets both of the following elements: (1) each antenna is located inside an antenna enclosure of no more than 3 cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements could fit within an imaginary enclosure of no more than 3 cubic feet; and (2) primary equipment enclosures are no larger than 17 cubic feet in volume.

Cities and towns may use their zoning authority to regulate the placement of facilities, so long as they do not violate the federal Telecommunications Act or prohibit the placement of all facilities within their jurisdictions.

Service Provider Duties Regarding Rights-of-Way. Service providers must: obtain necessary permits; follow local, state, and federal laws; cooperate with cities and towns to maintain safe conditions in the right-of-way; provide necessary information to cities and towns; obtain written permission before using another's structures; and construct and maintain their facilities at their own expense.

Relocation of Facilities. Service providers must relocate facilities by established deadlines unless they cannot meet the deadlines using best efforts. When reasonably necessary for

construction or during an emergency, cities and towns may require service providers to relocate facilities at their own expense. But a service provider may seek reimbursement from a municipality if: (1) the municipality required the service provider to move the same facilities within the past five years; or (2) the relocation was required for aesthetic reasons. Private parties must reimburse a service provider if the relocation was required for private purposes.

Pole Attachments. Telecommunications services providers often must use poles, ducts, conduits, or rights-of-way of competitors, other utility service providers, or governmental entities to serve new or expanded customer bases. The Federal Communications Commission (FCC) regulates the rates, terms, and conditions for pole attachments by cable television and telecommunications services providers or investor-owned utilities (IOUs), unless a state has adopted its own regulatory program. In Washington, the Utilities and Transportation Commission (UTC) has been granted authority to regulate attachment to poles owned by IOUs.

In 2015, the UTC adopted rules for pole attachments. The rules included requirements for:

- access to facilities, which also addresses capacity, terms for attachments, notice, and timelines for applications;
- authorized contractors to perform surveys and make-ready work;
- modifying facilities and replacing poles, including assignment of costs and petition to stay an action by a utility;
- determination of rates for attachments; and
- complaints.

The rules were effective January 1, 2016.

If a dispute arises regarding the rates, terms, or conditions of an attachment to a pole owned by a telecommunications company or an IOU, the aggrieved party may appeal to the UTC for resolution of the dispute. If dissatisfied, either party can appeal the UTC's decision to the courts.

Consumer-Owned Utilities. The UTC is prohibited from regulating the activities of consumer-owned utilities, which include public utility districts (PUDs), municipal utilities, and rural electric cooperatives. Attachments to poles owned by consumer-owned utilities are regulated by the utility's governing board.

A PUD must establish pole attachment rates that are just and reasonable. A PUD pole attachment rate must be calculated using a two-part formula as provided in statute. The formulas consist of the costs of procuring and maintaining pole attachments, capital and operating expenses of the PUD, and the required support and clearance space.

A locally regulated utility's rates for pole attachments must be just, reasonable, nondiscriminatory, and sufficient. The rates must be uniform for the same class of service within the regulated service area.

State Universal Service Program. In 2011, the FCC approved a process to end the complex system of fees, surcharges, and subsidies that support rural telephone companies, and transitioned federal monies toward expanding broadband Internet capability in underserved

areas. To assist rural companies in this transition period, the Legislature established a temporary universal service program operated by the UTC. The program expires in July 2019.

The Universal Service Program is funded by legislative appropriations to the Universal Communications Services Account (Universal Services Account). The maximum amount appropriated each year cannot exceed $5 million. A telephone company is eligible to receive distributions from the Universal Services Account if:

- the company has fewer than 40,000 access lines in the state;
- the company's customers are at risk of rate instability or service interruptions absent distributions to the company; and
- the company meets any other criteria established by the UTC.

Distributions from the Universal Services Account are made according to a formula developed by the UTC. The first round of distributions occurred in fiscal year 2015 and totaled $3.3 million. Future distributions will increase annually. By the fourth year, the amount projected to be distributed will exceed the $5 million annual cap. If less than $5 million is spent from the Universal Services Account in any fiscal year, the unspent portion must be carried over to subsequent fiscal years. Any money carried over is in addition to the $5 million allotted for any subsequent year.

Summary of Bill: Site-Specific Charges for Small Cell Facilities. The site-specific charge on a new structure for which the purpose is to install a small cell facility is limited to the lesser of the projected installation cost to the city or town or $500 annually. No additional fee may be imposed on wi-fi antennas strung between existing privately or publicly owned utility poles regardless of location.

Cities and towns must authorize the installation of small cell facilities or networks on city or town-owned structures located outside of the right-of-way to the same extent access is permitted to structures for other commercial projects or uses. The installation of small cell facilities is subject to reasonable rates, terms, and conditions. The amount charged to a small cell facility must be the lesser of the amount charged for similar commercial projects or uses to use the same space on similarly located property; the projected installation cost to the city or town; or $500 annually.

Cities and towns must provide service providers access to the right-of-way to attach small cell facilities to existing facilities owned by any entity and to install new or replacement poles for the purposes of installing small cell facilities. Access may be denied for safety and generally applicable engineering principles. A city or town may limit the height of a new or replacement pole to 132 percent of the average pole height in the vicinity.

Municipal Permitting Authority. An application for a master permit for attaching small cell facilities or installing a new or replacing a pole must be approved within 90 days of submittal. The master permit must provide for future use permits anywhere within the city or town and concealment, stealth, or aesthetic standards may not be required except in historic districts where the design standards apply to similar utility improvements. To facilitate scheduling and coordinating work in the right-of-way, cities and towns are required to provide as much advance notice as reasonable of plans to open the right-of-way for service

providers already in the right-of-way. Cities and towns may establish a procedure for the filing of those advance plans by service providers and other users of the right-of-way.

Installation of small cell facilities and small cell networks are exempt from land use review. However, installation of small cell facilities and small cell networks are subject to the following:

- building permit, if required to ensure compliance with the state Building Code;
- encroachment permits, if needed for construction in the right-of-way;
- use agreements, if located in a county right-of-way; and
- use permit, if located in a city or town right-of-way.

Cities and towns must issue permits with associated approvals for installing fiber optic cables connecting the small cell facilities and any required make-ready work within 90 days of submission of the application. Information that is not required of other applicants may not be required of applicants for small cell facilities exempt from land use review.

Cities or counties may deny an application only if the applicable building or electrical codes or standards are not met. The applicant has 30 days to cure the identified deficiencies and resubmit the application without being subject to an additional processing fee. The city or county must approve the revised application within 30 days of resubmittal.

The total fee for processing an individual permit or approval, including third-party fees, may not exceed $500. An application, permit or fee is not required for small cell facility work that is:

- routine maintenance, replacement of small cell facilities with substantially similar or smaller in size, weight, and height, and have the same or less wind loading and structural loading; or
- installation, placement, maintenance operation, or replacement of small cell facilities that are suspended on cable or line strung between existing utility poles in compliance with national safety codes.

Access to Facilities. A locally regulated utility (owner) that owns or controls poles on which attachments can be made must provide a licensee or utility (requester) that applies to make attachments with access for attachments to any facility the utility owns. An owner may deny access where capacity is insufficient or for safety, reliability, or generally applicable engineering principles reasons. However, the owner may not deny access to a pole based on insufficient capacity if the requester is willing to compensate the owner for the costs to replace the existing pole with a taller pole and conduct work to increase capacity for additional attachments.

All rates, terms, and conditions must be fair and reasonable and included in the attachment agreement with the person who licensed to make the attachments.

A requester must submit a written application to the owner to request access to their facilities.

The owner may:

- recover reasonable costs to process the application, which includes the costs to inspect the facilities and prepare a preliminary estimate for necessary make-ready work; and
- survey the facilities identified in the application and recover costs prior to conducting the survey.

The owner must provide:

- the requester with an estimate of costs prior to conducting the survey;
- a written response, which must include the results of the review, when access is granted;
- an estimate of charges to perform all make-ready work necessary; and
- a written response to the requester when the application is denied.

A complete application provides the necessary information for the owner to identify and evaluate the facilities the requester seeks to attach.

For requests to attach to poles, an owner must determine the timeframe for completing the make-ready work and provide that information to the requester and all known occupants with attachments on the pole who may be affected. The owner and the requester must coordinate all make-ready work with the other affected occupants. Notice must be provided that: includes the type of work to be done; includes where the work will occur; states that any occupant with an attachment may modify the attachment consistent with the make-ready work; and states that if the work is not completed within the timeframe set or the approved extension to the completion date, a contractor may be hired to complete the work. If the owner does not maintain a list of contractors, the requester may choose a contractor without the owner's authorization.

Timelines for the application and responses are provided. The time periods apply for requests for access of up to 300 poles or one-half of 1 percent of the owner's poles in state, whichever is less. An owner may extend the time periods when replacing poles for circumstances beyond the owner's control or unanticipated circumstances when conducting make-ready work.

A requester may negotiate an extension of the completion date when the owner has failed to complete a survey within the timeframe specified in the application. A requester may negotiate an extension of the completion date when the owner does not complete any required make-ready work. A requester may also hire a contractor from the owner's list of contractors to complete the work: immediately, if the owner informs the requester in writing that the owner declines to perform the necessary make-ready work; and if, after the end of the authorized time period, the owner has failed to complete the work in a timely manner.

An occupant with attachments does not need to submit an application when overlashing additional communications wires or cables onto cables or wires previously attached to the poles, but no more than 100 poles. However, the occupant must provide written notice to the owner identifying the poles and describing the additional communications wires or cables to be overlashed; the size, weight per foot, and number of wires; and maps of the overlash routes. The occupant may proceed with overlashing unless the owner provides written notice prohibiting the overlashing. The owner may refuse to permit overlashing only if the overlashing would have a significant adverse impact on the poles or other occupants' attachments.

Contractor Lists. An owner should make available and keep up-to-date a reasonably sufficient list of authorized contractors to perform surveys and make-ready work.

A requester must use a contractor on the owner's list. The requester may choose a contractor if an owner does not have an authorized contractors list. However, when hiring a contractor, a requester must provide the owner written notice identifying and providing contact information for the contractor. The owner or the owner's representative must have a reasonable opportunity to consult with the contractor and requester.

Modifying a Facility. The requester, all existing occupants, and owners that directly benefit from a modification to a facility to create capacity for additional attachments must bear the costs of the modification. The cost of the modification is proportionate to the amount of new or additional space each adds or modifies an attachment. An occupant or owner with an existing attachment is not considered to benefit if the attachment is only transferred to the new pole.

An occupant or owner creating a safety violation that requires a modification is responsible for bringing the facility into compliance. An owner or occupant is not responsible for costs of rearranging or replacing attachments if it was only necessary to bring another's attachment into conformance.

An owner must provide an occupant written notice prior to removal of, termination of service to, or modification of any facility. An owner may require the occupant to remove abandoned attachments. The owner must identify the attachments with sufficient evidence that the attachments were abandoned by the occupant. If the occupant does not respond to the owner within 20 days after delivery of the notice, the owner may remove the attachments without further notice.

Rates. The owner of a facility must be assured of cost recovery of not less than all of the additional costs of procuring and maintaining attachments nor more than the actual capital and operating expenses through a fair and reasonable rate for attachments. The formula for determining rates is provided in statute and based on the percentage of conduit capacity and the net linear cost of conduit.

Binding Arbitration. An owner or licensee—an authorized entity to construct attachments—may submit disputes to binding arbitration when the other party:

- fails to negotiate in good faith rates, terms, and conditions of an attachment agreement; or
- disputes the rates, terms, or conditions in an attachment agreement, the performance under the agreement, or obligations under the agreement.

Additionally, a licensee may submit disputes to binding arbitration if an owner has denied access to its facilities. An owner may submit disputes to binding arbitration if another licensee is unlawfully making or maintaining attachments to the owner's facilities.

Costs of arbitration must be borne equally by the participants in arbitration. Each party must cover their own costs and expenses, including legal fees.

Execution of an attachment agreement does not preclude a challenge when:

- the parties made good faith efforts to negotiate dispute rates, terms, or conditions but were unable to resolve the disputes and the challenge was brought within six months of the agreement; or
- the party challenging the rate, term, or condition was reasonably unware of the other's interpretation of the rate, term, or condition at the time of the agreement.

Submission to binding arbitration must include:

- statement of facts demonstrating good faith negotiations to resolve the disputed issues, and that the negotiations included an exchange of reasonably relevant information necessary to resolve the dispute;
- identification of all actions, rates, terms, and conditions alleged to be unjust, unfair, unreasonable, or insufficient;
- sufficient data of other factual information and legal argument to support the allegations; and
- a copy of the attachment agreement.

A licensee must prove its right to attach to the owner's facilities and that any attachment requirement is in violation of this act. An owner must prove the attachment rates, or denial of access to its facilities are in compliance with this act.

An arbiter must prescribe a rate, term, or condition, when the arbiter determines that a rate, term, or condition is not in compliance with this act. The rate, term, or condition must be included in the attachment agreement. If an arbiter determines that an owner has unlawfully or unreasonably denied or delayed access to a facility, the owner must provide access to the facility within a reasonable timeframe and on rates, terms, and conditions. An owner or occupant is not precluded from bringing any other complaint not related to rates, terms, or condition of the attachment.

State Universal Communication Services Program. The purpose of the program is changed from basic telecommunications to communications services in Washington. The program and its accounts are made permanent.

The following statutes are repealed: locally regulated utilities—attachments to poles; PUD pole attachment rate formula; obsolete reference regarding UTC requirements for the Universal Services program rules; and expiration of the state Universal Communication Services program.

Appropriation: None.

Fiscal Note: Requested on February 8, 2017.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This mirrors the UTC rules, which are working great. The rate formula has been tested. This should provide sustainable and

equitable, and certainty in the rates. There is an increasing demand for greater bandwidth. This bill will position the state to take advantage of a robust communications and technology infrastructure. Accelerated deployment and investment will support economic development, jobs, agriculture, medicine, and retail. It's not just about stringing new lines. Data speed and reliability is necessary for building our economy. Many states are already moving forward. WE need to invest or we'll be left behind. This compensates local governments for the use of poles in rights-of-way. Public utilities should have to follow the same rules as the IOUs.

CON: A consortium of cities are working on a model ordinance for all to use. We are already looking to the future. This undermines the cities obligations and authorities. This would restrict the cities' abilities to cover costs. Small cell deployment must be done as thoughtfully as other deployment. Rights-of-way are not just public but paid for by the public. There is a lot of infrastructure, public and private. The public demands it and pays for it. This would give nearly unfettered rights to attach in the rights-of way. They need to pay a fair and reasonable rates to protect public interest. We object to the change in standard that takes out sufficient in the cost recovery and the application of UTC rules to local utilities. The safeguards are inadequate and it puts at risk the reliability of the system. We have concerns about the loss of local control. This strips away rights to ensure safety of workers and the public and proper control of the rights-of-way.

OTHER: It's unclear how to implement this bill effectively and transparently. The subsidies would be directed to broadband, but the UTC doesn't regulate broadband. The purpose of the funds and intent need to be clarified.

Persons Testifying: PRO: Senator Doug Ericksen, Prime Sponsor; Michael Schutzler, WTIA; Joanie Deutsch, TechNet; Dale Merten, ToledoTel; Betty Buckley, citizen; Rhonda Weaver, Comcast; Ron Main, Broadband Communications Assoc. of WA; Joseph Ruggiero, Verizon; Bob Bass, AT&T.

CON: Jill Boudreau, City of Mount Vernon; Scott Hugill, City of Mountlake Terrace; Tom Brubaker, City of Kent; Bob Mack, Tacoma Public Utilities; Rose Feliciano, Seattle City Light; Steve Crume, Seattle City Light; Scott Richards, WA Public Utility Districts Association.

OTHER: Dave Danner, Chairman, UTC; Cathy Dahlquist, Frontier Communications; Louis Walter, IBEW77.

Persons Signed In To Testify But Not Testifying: No one.