

SENATE BILL 2504

By Ketron

AN ACT to amend Tennessee Code Annotated, Title 13,
relative to enacting the Competitive Wireless
Broadband Investment, Deployment, and Safety
Act of 2018.

WHEREAS, Tennessee has benefitted from its long-standing policy of encouraging investment in technologically advanced infrastructure that delivers access to information and connectivity between citizens; and

WHEREAS, this policy has included, in Tennessee Code Annotated, Title 65, a broad and technology neutral grant of access to deploy infrastructure along the streets, highways, and public works of the cities, counties, and the state, which is not intended to be limited by this act; and

WHEREAS, such access has been granted subject to certain local powers but free from local taxation or other fees or charges in excess of cost recovery; and

WHEREAS, Tennessee's economy depends upon the ability of Tennesseans to utilize robust and mobile connectivity to transact business and pursue education; and

WHEREAS, robust and mobile connectivity affords Tennesseans opportunities to be engaged in the civic and political activities of local and state government; and

WHEREAS, Tennessee's law enforcement, first responders, and healthcare providers can use wireless and mobile applications to protect the public's safety and well-being; and

WHEREAS, Tennessee's ability to remain a leader in automotive production, research, and development will be enhanced by rapid deployment of the 5G wireless connectivity that will be critical for safe operation of autonomous vehicles and for numerous smart transportation systems; and

WHEREAS, all of these factors provide a compelling basis for the General Assembly to set aside obstacles and discriminatory policies that may slow deployment of new infrastructure and improvements to existing networks for the purpose of supporting emerging wireless technologies and ensuring that Tennessee networks can keep up with the growing data demands of Tennesseans; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 13, Chapter 24, is amended by adding the following new part:

13-24-401. Short title.

This part shall be known and may be cited as the "Competitive Wireless Broadband Investment, Deployment, and Safety Act of 2018."

13-24-402. Part definitions.

As used in this part:

(1) "Applicant" means any person who submits an application pursuant to this part;

(2) "Application" means a request submitted by an applicant to an authority:

(A) For a permit to colocate small wireless facilities; or

(B) To approve the installation or modification of a utility pole or wireless support structure;

(3) "Authority" means:

(A) Within a municipal boundary, the municipality, regardless of whether such municipality is a metropolitan government;

(B) Within an unincorporated county and outside a municipal boundary, the county; or

(C) Upon state-owned property, the state;

(4) "Authority-owned utility pole" means a utility pole owned by an authority but does not include a utility pole owned by a distributor of electric power, regardless of whether an electric distributor is investor-owned, cooperatively-owned, or government-owned;

(5) "Colocate," "colocating", and "colocation" mean, in their respective noun and verb forms, to install, mount, maintain, modify, operate, or replace wireless facilities on or adjacent to a wireless support structure or utility pole. "Colocation" does not include the installation of new utility poles, authority-owned utility poles, or wireless support structures;

(6) "Communications facility" means the set of equipment and network components, including wires and cables and associated facilities, used by a communications provider to provide communications service;

(7) "Communications service" means cable service as defined in 47 U.S.C. § 522 (6), telecommunications service as defined in 47 U.S.C. § 153(24), information service as defined in 47 U.S.C. § 153(24) or wireless service;

(8) "Fee" means a one-time, nonrecurring charge;

(9) "Historic district" means a property or area zoned as a historic district or zone pursuant to § 13-7-404;

(10) "Micro wireless facility" means a small wireless facility that:

(A) Does not exceed twenty-four inches (24") in length, fifteen inches (15") in width, and twelve inches (12") in height; and

(B) The exterior antenna, if any, does not exceed eleven inches (11") in length;

(11) "Person" means an individual, corporation, limited liability company, partnership, association, trust, or other entity or organization, including an authority;

(12) "Rate" means a recurring charge;

(13) "Right-of-way" or "ROW" means the space, in, upon, above, along, across, and over all public streets, highways, avenues, roads, alleys, sidewalks, tunnels, viaducts, bridges, skywalks under the control of the authority, and any unrestricted public utility easement established, dedicated, platted, improved, or devoted for utility purposes and accepted as such public utility easement by the authority, but excluding lands other than streets that are owned by the authority;

(14)

(A) "Small wireless facility" means a wireless facility with:

(i) An antenna that could fit within an enclosure of no more than six (6) cubic feet in volume; and

(ii) Other wireless equipment in addition to the antenna that is cumulatively no more than twenty-eight (28) cubic feet in volume, regardless of whether the facility is ground-mounted or pole-mounted. For purposes of this subdivision (14)(A)(ii), "other wireless equipment" does not include an electric meter, concealment element, telecommunications demarcation box, grounding equipment, power transfer switch, cut-off switch, or a vertical cable run for the connection of power and other services; and

(B) "Small wireless facility" includes a micro wireless facility;

(15) "Utility pole" means a pole or similar structure that is or may be used in whole or in part to support infrastructure or network components that deliver communications and includes structures used for electric distribution, lighting, traffic control, signage, or a similar function, including poles installed solely for the collocation of small wireless facilities. "Utility pole" does not include wireless support structures. When "utility pole" is modified by the term "new," then "new utility pole" means a utility pole that does not exist at the time the application is submitted, including, but not limited to, a utility pole that will replace an existing pole;

(16) "Wireless backhaul facility" means a facility used to transport services by wire from a wireless facility to a network;

(17)

(A) "Wireless facility" means equipment at a fixed location that enables wireless communications between user equipment and a communications network, including:

(i) Equipment associated with wireless communications;

and

(ii) Radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration;

(B) "Wireless facility" does not include:

(i) The structure or improvements on, under, or within which the equipment is collocated; or

(ii) Coaxial or fiber-optic cable that is between wireless structures or utility poles, including wireless backhaul or

communications facilities that otherwise are not immediately adjacent to or directly associated with a particular antenna; and

(C) "Wireless facility" includes small wireless facilities;

(18) "Wireless services" means any service using licensed or unlicensed spectrum, including the use of WiFi, whether at a fixed location or mobile, provided to the public using wireless facilities; and

(19) "Wireless support structure" means a freestanding structure, such as a monopole; tower, either guyed or self-supporting; billboard; or other existing or proposed structures designed to support or capable of supporting wireless facilities. "Wireless support structure" does not include a utility pole.

13-24-403. Construction of part.

This part shall be construed to maximize investment in wireless connectivity across the state by creating a uniform and predictable framework that limits local obstacles to deployment of small wireless facilities and to encourage, where feasible, shared use of public infrastructure and colocation in a manner that is the most technology neutral and nondiscriminatory.

13-24-404. Local option and preemption.

(a) Nothing in this part requires any authority to promulgate any limits, permitting requirements, zoning requirements, approval policies, or any process to obtain permission to deploy small wireless facilities. However, any authority that promulgates limits, permitting requirements, zoning requirements, approval policies, or processes relative to deployment of small wireless facilities shall not impose limits, requirements, policies, or processes that are:

(1) More restrictive than requirements, policies, or processes set forth in this part;

- (2) In excess of that which is granted by this part; or
- (3) Otherwise in conflict with this part.

(b) Any limits, requirements, policies, or processes that are more restrictive, in conflict with, or in excess of that which is granted by this part are void, regardless of the date on which the requirement, policy, or process was enacted or became law.

13-24-405. Existing law unaffected.

This part does not:

- (1) Create regulatory jurisdiction for any subdivision of the state regarding communications services that does not exist under applicable law, regardless of the technology used to deliver the services;
- (2) Restrict access granted by § 65-21-201;
- (3) Authorize the creation of local taxation in the form of ROW taxes, rates, or fees that exceed the cost-based fees authorized under existing law, except that the specific fees or rates established pursuant to this part do not exceed cost; or
- (4) Alter or exempt any entity from the franchising requirements for providing video services or cable services set forth in title 7, chapter 59.

13-24-406. Prohibited activities.

An authority shall not:

- (1) Enter into an exclusive arrangement with any person for use of a ROW for the construction, operation, marketing, or maintenance of small wireless facilities;
- (2) Discriminate by prohibiting an applicant from making any type of installation that is generally permitted when performed by other users of the

ROW or by imposing any maintenance or repair obligations not generally applicable to all ROW users; or

(3) Impose discriminatory prohibitions against deploying new utility poles for small wireless facilities. Only requirements imposed upon all users of a ROW may be applied to prohibit an applicant's deployment of new utility poles.

13-24-407. Uniform fees for deployment of small wireless facilities; exceptions.

(a) The following are the maximum fees and rates that may be charged to an applicant by an authority for deployment of a small wireless facility:

(1) The maximum application fee is one hundred dollars (\$100) each for the first five (5) small wireless facilities and fifty dollars (\$50.00) for each additional small wireless facility; and

(2) The maximum annual rate for collocation of a small wireless facility on an authority-owned utility pole is thirty five dollars (\$35.00).

(b) In addition to the maximum fees and rates described in subsection (a), an authority shall not require applicants:

(1) To pay fees or reimburse costs for the services or assistance provided to the authority by a consultant or third party retained by the authority relative to deployment of small wireless facilities; or

(2) To file additional applications or permits for regular maintenance, replacement, or repairs made to an applicant's own facilities.

(c) This section does not prohibit an authority from requiring generally applicable work or traffic permits, or from collecting the same applicable fees for such permits, for deployment of a small wireless facility as long as the work or traffic permits are issued and associated fees are charged on the same basis as other construction activity in a ROW.

(d) This section does not prohibit an authority from retaining any consultant or third party when the fees and costs for the consultant or third party are paid by the authority, using the authority's own funds, rather than requiring applicants to reimburse or pay for the consultants or third parties.

(e)

(1) Except for the application fees, permit fees, and colocation rates set out in this section, no authority shall require additional rates or fees of any kind, including, but not limited to, rental fees, access fees, or site license fees for the initial deployment or the continuing presence of a small wireless facility.

(2) No authority shall require additional applications, fees, or rates for:

(A) Routine maintenance of a small wireless facility;

(B) The replacement of a small wireless facility with another small wireless facility that is smaller than the size conditions set out in the definition of "small wireless facility" in § 13-24-402; or

(C) The installation, placement maintenance, operation, or replacement of a micro wireless facility that is suspended on cables that are strung between existing utility poles of a telecommunication or electric distribution services provider, in compliance with the National Electrical Safety Code as set out in § 68-101-104.

(3) No authority shall require execution of any access agreement or site license agreement as a condition of deployment of a small wireless facility in a ROW.

(4) An authority shall not directly or indirectly require an applicant to perform services for the authority or provide goods to the authority such as in-kind contributions to the authority, including, but not limited to, reserving fiber,

conduit, or pole space for the authority in exchange for deployment of small wireless facilities.

13-24-408. Uniform requirements for deployment and maintenance of small wireless facilities; exceptions.

(a)

(1) No authority shall restrict the size, height, or otherwise regulate the appearance or placement of small wireless facilities, or prohibit collocation on utility poles, except an authority may require that:

(A) A new or modified utility pole installed in the ROW not exceed the greater of:

(i) Ten feet (10') in height above the tallest existing utility pole in place as of the effective date of this act that is located within five hundred feet (500') of the new pole in the same ROW;

or

(ii) Fifty feet (50') above ground level;

(B) Small wireless facilities deployed in the ROW after the effective date of this part shall not extend:

(i) More than ten feet (10') above an existing utility pole in place as of the effective date of this act; or

(ii) On a new utility pole, ten feet (10') above the height permitted for a new utility pole under this section.

(2) An applicant may construct, modify, and maintain a utility pole or small wireless facility that exceeds the height limits set out in subdivision (a)(1), only if the authority's generally applicable zoning regulations allow for the taller structures.

(b) An authority may require an applicant to comply with an authority's nondiscriminatory requirements for placing all electric, cable, and communications facilities underground in a designated area of a ROW if the authority:

(1) Has required all electric, communications, and cable facilities other than authority poles and attachments to be placed underground by a date certain that is three (3) months prior to the submission of the application;

(2) Does not prohibit the replacement of authority-owned utility poles in the designated area; and

(3) Permits applicants to seek a waiver of the underground requirements for the placement of a new utility pole to support small wireless facilities and the approval or nonapproval of the waivers are decided in a nondiscriminatory manner.

(c)

(1) Except for facilities excluded from evaluation for effects on historic properties under 47 C.F.R. § 1.1307(a)(4) or any subsequently enacted similar regulations, an authority may require reasonable, nondiscriminatory, and technology neutral design or concealment measures in a historic district if:

(A) The design or concealment measures do not have the effect of prohibiting any applicant's technology or reducing the functionality of the small wireless facility; and

(B) The design or concealment measures are not considered a part of the small wireless facility for purposes of the size conditions contained in the definition of "small wireless facility" in § 13-24-402.

(2) Nothing in this section limits an authority's enforcement of historic preservation zoning regulations consistent with the preservation of local zoning

authority under 47 U.S.C. § 332(c)(7), the requirements for facility modifications under 47 U.S.C. § 1455(a), or the National Historic Preservation Act of 1966 codified in 54 U.S.C. § 300101 et seq., and the regulations adopted and amended from time to time to implement those laws.

(d) No authority shall require network design for small wireless facilities, including mandating the selection of any specific utility pole or category of poles to which an applicant must attach any part of its network. No authority shall limit the placement of small wireless facilities by imposing minimum separation distances for small wireless facilities or the structures on which the facilities are colocated.

(e) An authority may prohibit collocation on authority-owned utility poles that are identified as utility poles the mast arms of which are routinely removed to accommodate frequent events, including, but not limited to, regularly scheduled street festivals or parades. To qualify for this exception, an authority must publish a list of such utility poles on its website and may prohibit collocation only if the pole has been designated as an exception pursuant to this subsection (e) thirty (30) days prior to an application.

(f) An applicant may replace existing authority-owned utility poles when collocating a small wireless facility, and the replacement utility pole shall be owned by the authority. When replacing a utility pole that is used for decorative as well as functional purposes, any replacement pole must reasonably conform to the design aesthetics of the utility pole being replaced. When replacing a utility pole used for lighting, an authority may require the applicant to provide lighting on the replacement utility pole and the lighting shall become the property of the authority, including responsibility of the authority for electricity and maintenance.

13-24-409. Uniform application procedures.

(a) An authority may require an applicant to seek permission by application to collocate a small wireless facility or install a new or modified utility pole associated with a small wireless facility and obtain one (1) or more work permits, as long as the work permits are of general applicability and do not apply exclusively to wireless facilities.

(b) If an authority requires an applicant to seek permission pursuant to subsection (a), the authority must comply with the following:

(1) An authority shall allow an applicant to include up to twenty (20) small wireless facilities within a single application;

(2) An authority shall, within ten (10) days of receiving an application, determine whether an application is complete and notify the applicant. If an application is incomplete, an authority must specifically identify the missing information in writing when the applicant is notified;

(3) An authority shall process all applications on a nondiscriminatory basis;

(4) An authority shall approve or deny an application within sixty (60) days of receipt of the application. If the application is not approved or denied within sixty (60) days, the application is deemed approved. An authority shall not extend the sixty-day period to provide for additional or supplemental review by additional departments or designees. However, the sixty-day period shall be tolled if an authority sends notice to the applicant that the application is incomplete within ten (10) days after the initial application. Any tolling within ten (10) days shall cease once additional or supplemental information is provided to the authority. Notwithstanding this subdivision (b)(4) to the contrary, the authority and the applicant may mutually agree to toll the sixty-day period;

(5) An authority shall provide written explanation for denying an application concurrent with issuance of the denial. An authority shall not deny an application for any reason not expressly provided in this part;

(6) An applicant may cure deficiencies identified by the authority and resubmit an application within thirty (30) days of the denial without paying an additional application fee. An authority shall approve or deny the revised application within thirty (30) days from the time the revised application is submitted to the authority. Any subsequent review of an application must be limited to the deficiencies cited in the denial;

(7) An authority shall not, either expressly or de facto, discontinue its application process or prohibit deployment under the terms of this part prior to adoption of any application process; and

(8) An authority shall not require applicants to provide any information not listed in this subdivision (b)(8). An authority may require the following information to be provided in an application:

(A) A preliminary site plan with a diagram or engineering drawing depicting the design for installation of the small wireless facility;

(B) The location of the site, including the latitude and longitudinal coordinates of the specific location of the site;

(C) Identification of any third party upon whose utility pole or support structure the applicant intends to collocate and certification by the applicant that it has obtained approval from the third party;

(D) The applicant's identifying information and a certification that the applicant agrees to pay applicable fees and rates, repair damage, and comply with all nondiscriminatory and generally applicable ROW

requirements for deployment of any associated infrastructure that is not a small wireless facility;

(E) The applicant's certification of compliance with insurance or indemnification requirements, if any, that the authority imposes on all users of the ROW; and

(F) The applicant's certification that the proposed site plan and design plans meet or exceed all applicable engineering, materials, electrical, and safety standards.

(c) An applicant must complete deployment of the applicant's small wireless facilities within one (1) year of the issuance of permits and approval of applications for the small wireless facilities unless the authority and the applicant agree to extend the period, or delay is caused by a lack of commercial power or communications transport facilities to the site. If an applicant fails to complete deployment within the time required pursuant to this subsection (c), then the authority may require that the applicant complete a new application.

(d) The approval of the installation, placement, maintenance, or operation of a small wireless facility pursuant to this part does not authorize the provision of any communications service or the installation, placement, maintenance or operation of any communications facility, including a wireline backhaul facility, other than a small wireless facility, in a right of way.

13-24-410. Local powers preserved.

Consistent with the limitations set forth in this part, an authority may require applicants to:

(1) Follow generally applicable and nondiscriminatory requirements that structures and facilities placed within a ROW must be constructed and

maintained as not to obstruct or hinder the usual travel upon pedestrian or automotive travelways or public safety on the ROW or obstruct the legal use of the ROW by utilities;

(2) Follow an aesthetic plan established by the authority for a defined area or zone by complying with generally applicable and nondiscriminatory standards on all users of a ROW, except that an authority shall not apply standards in a manner that precludes deployment of small wireless facilities or precludes deployment of small wireless facilities as a permitted use pursuant to zoning requirements;

(3) An authority may impose generally applicable and nondiscriminatory requirements to repair damage caused by users of a ROW, including damage to public roadways or to other utility facilities placed in a ROW; and

(4) An authority may impose generally applicable and nondiscriminatory requirements for applicants to maintain insurance or provide indemnification for claims arising from the applicant's negligence to the same extent required of all ROW users.

13-24-411. Private right of action.

Any party aggrieved by the failure of an authority to act in accordance with this part may seek remedy in the chancery court for the county in which the applicant attempted to deploy or has deployed a small wireless facility. The court may order an appropriate remedy to address any action inconsistent with this part.

SECTION 2. The headings to sections in this act are for reference purposes only and do not constitute a part of the law enacted by this act. However, the Tennessee Code Commission is requested to include the headings in any compilation or publication containing this act.

SECTION 3. This act shall take effect upon becoming a law, the public welfare requiring it.