SB-649 Wireless telecommunications facilities. (2017-2018)

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CALIFORNIA LEGISLATURE— 2017–2018 REGULAR SESSION

SENATE BILL NO. 649

Introduced by Senator Hueso
(Principal coauthor: Assembly Member Quirk)
(Coauthor: Senator Dodd)
(Coauthor: Assembly Member Dababneh)

February 17, 2017

An act to add Sections 65964.2 and 65964.5 to the Government Code, relating to telecommunications.

LEGISLATIVE COUNSEL'S DIGEST

SB 649, Hueso. Wireless telecommunications facilities.

(1) Existing federal law prohibits a state or local statute, regulation, or legal requirement from prohibiting an interstate or intrastate telecommunications service, but recognizes the ability of a state to impose, 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. If the Federal Communications Commission (FCC) determines that this prohibition has been violated, existing federal law requires the FCC to preempt the enforcement of the offending statute, regulation, or legal requirement to the extent necessary to correct the violation. Existing federal law additionally recognizes the authority of a state or local government to manage public rights-of-way or to require fair and reasonable

compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for the use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by that government. Existing federal law provides that no state or local government has the authority to regulate the entry of, or the rates charged by, a commercial mobile service, but permits a state to regulate the other terms and conditions of commercial mobile services.

Under existing law, the placement or installation of certain wireless facilities, including antennas and related equipment, on or immediately adjacent to a wireless telecommunications facility, as specified, is a permitted use not subject to a city or county discretionary permit, but certain other wireless telecommunications facilities are subject to city or county discretionary permitting and are required to comply with specified criteria.

This bill would provide that a small cell, as defined, is a permitted use, subject only to a specified permitting process adopted by a city or county, if the small cell meets specified requirements. By imposing new duties on local agencies, this bill would impose a state-mandated local program. The bill would authorize a city or county to require an encroachment permit or a building permit, and any additional ministerial permits, for a small cell, as specified. The bill would authorize a city or county to charge 3 types of fees relating to these small cells: an annual charge for each small cell attached to city or county vertical infrastructure, an annual attachment rate, and a one-time reimbursement fee. The bill would require the city or county to comply with notice and hearing requirements before imposing the annual attachment rate. The bill would require an action or proceeding to challenge a fee imposed under the provisions of this bill to be commenced within 120 days of the effective date of the ordinance or resolution. This bill would require each wireless service provider, on or before July 1, 2019, and again on or before December 31, 2020, to submit a report to the Legislature specifying the number of, and geographical location by ZIP Code of, the small cells that the wireless service provider has commenced operating within the state during the 18 months preceding the date of each report.

(2) Existing law requires a local publicly owned electric utility, as defined, to make available appropriate space and capacity on and in certain utility poles and related structures. Existing law requires fees adopted to cover the costs to provide this use, and the terms and conditions of access, to meet specified requirements, and specifies the manner in which these fees and terms and conditions of access may be challenged.

This bill would provide that it does not authorize or impose an obligation to charge a different use fee on a local publicly owned electric utility, and does not change or remove any obligation by the owner or operator of a small cell to comply with a local publicly owned electric utility's reasonable and feasible safety, reliability, and engineering policies.

(3) The Digital Infrastructure and Video Competition Act of 2006 establishes a procedure for the issuance of state franchises for the provision of video service and cable service and designates the Public Utilities Commission as the sole franchising authority for a state franchise under the act. The act requires the holder of a state franchise to pay franchise fees, as specified. The act prescribes the extent of the obligation of a holder of a state franchise to provide public, educational, and governmental access (PEG) channels, but authorizes a local entity, as defined, to establish a fee to support the costs of PEG channel facilities, in the amount of 1% of gross revenues, or more in specified circumstances.

This bill would prohibit a city or county from requiring a provider of video or cable service to obtain any additional authorization or permit not described above to provide any communications services that are provided by a provider that holds a franchise pursuant to the act. The bill would prohibit a city or county from requiring the provider of video or cable service to pay any tax, fee, assessment, or other charge not authorized by the act, this bill, or other state laws.

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.
Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. (a) The Legislature finds and declares that, to ensure that communities across the state have access to the most advanced communications technologies and the transformative solutions that robust wireless and wireline connectivity enables, such as Smart Communities and the Internet of Things, California should work in coordination with federal, state, and local officials to create a statewide framework for the deployment of advanced wireless communications infrastructure in California that does all of the following:

(1) Reaffirms local governments' historic role and authority with respect to communications infrastructure siting and construction generally.

(2) Reaffirms that deployment of telecommunications facilities in public rights-of-way is a matter of statewide concern, subject to a statewide franchise, and that expeditious deployment of telecommunications networks generally is a matter of both

statewide and national concern.

(3) Recognizes that the impact on local interests from individual small cells will be sufficiently minor and that such deployments should be a permitted use statewide and should be subject only to encroachment or building permits, or their functioning equivalents, while requiring providers to comply with all applicable federal, state, and local health and safety regulations, including the federal Americans with Disabilities Act of 1990 and the California Public Utilities Commission's General Order 95.

(4) Makes small cell installations on vertical infrastructure, and on property outside a public right-of-way, subject to feasible design and collocation standards, including reasonable and objective specifications regarding the appearance and location of the small cell installation.

(5) Grants providers access to locally owned vertical infrastructure located within public rights-of-way under reasonable terms and conditions.

(6) Grants providers nondiscriminatory access to property owned or controlled by a local jurisdiction that is not in a public right-of-way and is already being used for comparable purposes under similar terms and conditions.

(7) Provides for full recovery by local governments of the costs of attaching communications facilities to utility poles, streetlights, and other suitable host infrastructure in a manner that is consistent with existing federal and state laws governing utility pole attachments generally, and of an additional charge of up to two hundred fifty dollars ($250) for small cell attachments to vertical infrastructure owned or controlled by a city or county.

(8) Permits local governments to charge permit fees that are fair, reasonable, nondiscriminatory, and cost based.

(9) Preserves existing agreements between wireless service providers and local governments for the leasing or licensing of vertical infrastructure for small cell attachments.

(10) Advances technological and competitive neutrality while not adding new requirements on competing providers that do not exist today.

(11) Limits the creation or erection of unreasonable requirements for access to public rights-of-way by communications providers, including excessive delays in negotiations and approvals for communications facilities.

(b) The Legislature further finds and declares that wireless service providers deploy small cells to areas based on demand for services regardless of the income characteristics of the areas, that this act will complement efforts to close the digital divide by creating a framework that will incentivize private industry to invest or accelerate investment in the deployment of small cells, and that this act will complement current state and federal government efforts to subsidize the deployment of broadband, including all of the following:

(1) The Federal Communications Commission's Mobility Fund II Program, a program to help expand mobile coverage across rural America and tribal lands by providing $4.5 billion in subsidies within the next 10 years.

(2) The Connect America Fund, a Federal Communications Commission program that expands access to voice and broadband services to unserved locations across the country.

(3) The California Advanced Services Fund, a program promoting, on a technologically neutral basis, the deployment of broadband infrastructure to unserved and underserved areas with a goal of providing broadband access to 98 percent of Californian households.

SEC. 2. Section 65964.2 is added to the Government Code, to read:

65964.2. (a) A small cell shall be a permitted use subject only to a permitting process adopted by a city or county pursuant to subdivision (b) if it satisfies the following requirements:

(1) The small cell is located in a public right-of-way in any zone or in any zone that includes a commercial or industrial use.

(2) The small cell complies with all applicable federal, state, and local health and safety regulations, including the federal Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12101 et seq.).

(3) The small cell is not located on a fire department facility.

(b) (1) A city or county may require that a small cell be approved pursuant to a building permit or its functional equivalent in connection with placement outside of public rights-of-way or an encroachment permit or its functional equivalent issued consistent with Sections 7901 and 7901.1 of the Public Utilities Code for placement in public rights-of-way, and any additional ministerial permits, provided that all permits are issued within the timeframes required by state and federal law.

(2) Permits issued pursuant to this subdivision may be subject to the following:

(A) The same permit requirements as for similar construction projects and applied in a nondiscriminatory manner.

(B) A requirement to submit additional information showing that the small cell complies with the Federal Communications Commission's regulations concerning radio frequency emissions referenced in Section 332(c)(7)(B)(iv) of Title 47 of the United States Code.

(C) A condition that the applicable permit may be rescinded if construction is not substantially commenced within one year. Absent a showing of good cause, an applicant under this section may not renew the permit or resubmit an application to develop a small cell at the same location within six months of rescission.

(D) A condition that small cells no longer used to provide service shall be removed at no cost to the city or county.

(E) Compliance with building codes, including building code structural requirements.

(F) A condition that the applicant pay all electricity costs associated with the operation of the small cell.

(G) A condition requiring compliance with feasible design and collocation standards on a small cell to be installed on property not in public rights-of-way.

(H) A condition to indemnify a city, county, or city and county, against claims brought by third parties against the city, county, or city and county, associated with the installation of a small cell.

(3) Permits issued pursuant to this subdivision shall not be subject to any of the following conditions:

(A) Requirements to provide additional services, directly or indirectly, including, but not limited to, in-kind contributions from the applicant such as reserving fiber, conduit, or pole space.

(B) The submission of any additional information other than that required of similar construction projects, except as specifically provided in this section.

(C) Limitations on routine maintenance or the replacement of small cells with small cells that are substantially similar, the same size or smaller.

(4) A city or county shall not impose permitting requirements or fees on the installation, placement, maintenance, or replacement of micro wireless facilities that are suspended, whether embedded or attached, on communication cables strung between utility poles in compliance with state safety codes.

(c) A city or county shall not preclude the leasing or licensing of its vertical infrastructure located in public rights-of-way or public utility easements under the terms set forth in this subdivision. Vertical infrastructure shall be made available for the placement of small cells under fair and reasonable fees, subject to the requirements in subdivision (d), terms, and conditions, which may include feasible design and collocation standards. A city or county may reserve capacity on vertical infrastructure if the city or county adopts a resolution finding, based on substantial evidence in the record, that the capacity is needed for projected city or county uses.

(d) (1) A city or county may charge the following fees:

(A) An annual charge not to exceed two hundred fifty dollars ($250) for each small cell attached to city or county vertical infrastructure.

(B) An annual attachment rate that does not exceed an amount resulting from the following requirements:

(i) The city or county shall calculate the rate by multiplying the percentage of the total usable space that would be occupied by the attachment by the annual costs of ownership of the vertical infrastructure and its anchor, if any.

(ii) The city or county shall not levy a rate that exceeds the estimated amount required to provide use of the vertical infrastructure for which the annual recurring rate is levied. If the rate creates revenues in excess of actual costs, the city or county shall use those revenues to reduce the rate.

(iii) For purposes of this subparagraph:

(I) "Annual costs of ownership" means the annual capital costs and annual operating costs of the vertical infrastructure, which shall be the average costs of all similar vertical infrastructure owned or controlled by the city or county. The basis for the computation of annual capital costs shall be historical capital costs less depreciation. The accounting upon which the historical capital costs are determined shall include a credit for all reimbursed capital

costs. Depreciation shall be based upon the average service life of the vertical infrastructure. Annual cost of ownership does not include costs for any property not necessary for use by the small cell.

(II) “Usable space” means the space above the minimum grade that can be used for the attachment of antennas and associated ancillary equipment.

(C) A one-time reimbursement fee for actual costs incurred by the city or county for rearrangements performed at the request of the small cell provider.

(2) A city or county shall comply with the following before adopting or increasing the rate described in subparagraph (B) of paragraph (1):

(A) At least 14 days before the hearing described in subparagraph (C), the city or county shall provide notice of the time and place of the meeting, including a general explanation of the matter to be considered.

(B) At least 10 days before the hearing described in subparagraph (C), the city or county shall make available to the public data indicating the cost, or estimated cost, to make vertical structures available for use under this section if the city or county adopts or increases the proposed rate.

(C) The city or county shall, as a part of a regularly scheduled public meeting, hold at least one open and public hearing at which time the city or county shall permit the public to make oral or written presentations relating to the rate. The city or county shall include a description of the rate in the notice and agenda of the public meeting in accordance with the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5).

(D) The city or county may approve the ordinance or resolution to adopt or increase the rate at a regularly scheduled open meeting that occurs at least 30 days after the initial public meeting described in subparagraph (C).

(3) A judicial action or proceeding to attack, review, set aside, void, or annul an ordinance or resolution adopting, or increasing, a fee described in this subdivision, shall be commenced within 120 days of the effective date of the ordinance or resolution adopting or increasing the fee. A city or county or interested person shall bring an action described in this paragraph pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure in a court of competent jurisdiction.

(4) This subdivision does not prohibit a wireless service provider and a city or county from mutually agreeing to a rate, charge, term, or condition that is different from that established pursuant to the procedures in this subdivision, provided that either party may withdraw from negotiations seeking such an agreement by written notice.

(e) A city or county shall not discriminate against the deployment of a small cell on property owned by the city or county and shall make space available on property not located in public rights-of-way under terms and conditions that are no less favorable than the terms and conditions under which the space is made available for comparable commercial projects or uses. These installations shall be subject to reasonable and nondiscriminatory rates, terms, and conditions, which may include feasible design and collocation standards.

(f) This section does not alter, modify, or amend any franchise or franchise requirements under state or federal law, including Section 65964.5.

(g) For purposes of this section, the following terms have the following meanings:

(1) “Feasible design and collocation standards” means reasonable and objective specifications concerning the physical structure, construction, location, and appearance of a small cell, provided that those specifications facilitate the installation of the small cell and may be waived by the city or county on a nondiscriminatory basis.

(2) “Micro wireless facility” means a small cell that is no larger than 24 inches in length, 15 inches in width, 12 inches in height, and that has an exterior antenna, if any, no longer than 11 inches.

(3) (A) “Small cell” means a wireless telecommunications facility, as defined in paragraph (2) of subdivision (d) of Section 65850.6, or a wireless facility that uses licensed or unlicensed spectrum and that meets the following qualifications:

(i) The small cell antennas on the structure, excluding the associated equipment, total no more than six cubic feet in volume, whether an array or separate.

(ii) Any individual piece of associated equipment on pole structures does not exceed nine cubic feet.

(iii) The cumulative total of associated equipment on pole structures does not exceed 21 cubic feet.

(iv) The cumulative total of any ground-mounted equipment along with the associated equipment on any pole or nonpole structure does not exceed 35 cubic feet.

(v) The following types of associated ancillary equipment are not included in the calculation of equipment volume:

(I) Electric meters and any required pedestal.

(II) Concealment elements.

(III) Any telecommunications demarcation box.

(IV) Grounding equipment.

(V) Power transfer switch.

(VI) Cutoff switch.

(VII) Vertical cable runs for the connection of power and other services.

(VIII) Equipment concealed within an existing building or structure.

(B) “Small cell” includes a micro wireless facility.

(C) “Small cell” does not include the following:

(i) A wireline backhaul facility, which is defined to mean a facility used for the transport of communications data by wire from wireless facilities to a network.

(ii) Coaxial or fiber optic cables that are not immediately adjacent to or directly associated with a particular antenna or collocation.

(iii) Wireless facilities placed in any historic district listed in the National Park Service Certified State or Local Historic Districts or in any historical district listed on the California Register of Historical Resources or placed in coastal zones subject to the jurisdiction of the California Coastal Commission.

(iv) The underlying vertical infrastructure.

(4) (A) “Vertical infrastructure” means all poles or similar facilities owned or controlled by a city or county that are in public rights-of-way or public utility easements and meant for, or used in whole or in part for, communications service, electric service, lighting, traffic control, or similar functions.

(B) For purposes of this paragraph, facilities are “controlled” by a city or county if the city or county has the right to allow subleases or sublicensing. A city or county may impose feasible design or collocation standards for small cells placed on vertical infrastructure, including the placement of associated equipment on the vertical infrastructure or the ground.

(5) “Wireless service provider” means a provider of “commercial mobile radio service” or “commercial mobile data service,” as those terms are defined in Section 20.3 of Title 47 of the Code of Federal Regulations, using spectrum radio frequencies licensed to it by the Federal Communications Commission or any successor agency.

(h) Existing agreements with a wireless provider or its agent regarding the leasing or licensing of vertical infrastructure entered into before the operative date of this section remain in effect, subject to applicable termination provisions. The operator of a small cell may accept the rates of this section for small cells that are the subject of an application submitted after the agreement is terminated pursuant to the terms of the agreement.

(i) Nothing in this section shall be construed to authorize or impose an obligation to charge a use fee different than that authorized by Part 2 (commencing with Section 9510) of Division 4.8 of the Public Utilities Code on a local publicly owned electric utility.

(j) This section does not change or remove any obligation by the owner or operator of a small cell to comply with a local publicly owned electric utility’s reasonable and feasible safety, reliability, and engineering policies.

(k) A city or county shall consult with the utility director of a local publicly owned electric utility when adopting an ordinance or establishing permitting processes consistent with this section that impact the local publicly owned electric utility.

(l) This section shall not be construed to modify the rules and compensation structure that have been adopted for an attachment to a utility pole owned by an electrical corporation or telephone corporation, as those terms are defined in Section 216 of the Public Utilities Code pursuant to state and federal law, including, but not limited to, decisions of the Public Utilities Commission

adopting rules and a compensation structure for an attachment to a utility pole owned by an electrical corporation or telephone corporation, as those terms are defined in Section 216 of the Public Utilities Code.

(m) This section shall not be construed to modify any applicable rules adopted by the Public Utilities Commission, including General Order 95 requirements, regarding the attachment of wireless facilities to a utility pole owned by an electrical corporation or telephone corporation, as those terms are defined in Section 216 of the Public Utilities Code, and shall not preclude a city or county from exercising authority granted to a local government to enforce state safety regulations.

(n) The Legislature finds and declares that small cells, as defined in this section, have a significant economic impact in California and are not a municipal affair as that term is used in Section 5 of Article XI of the California Constitution, but are a matter of statewide concern.

(o) On or before July 1, 2019, and again on or before December 31, 2020, each wireless service provider shall submit a report to the Legislature specifying the number of, and geographical location by ZIP Code of, the small cells that the wireless service provider has commenced operating within the state during the 18 months preceding the date of each report. In order to protect competitively sensitive information, the wireless service provider may aggregate and submit that information through a third party.

SEC. 3. Section 65964.5 is added to the Government Code, to read:

65964.5. Except as provided in Sections 65964, 65964.2, and 65850.6, or as specifically required by state law, a city or county may not require a provider of video or cable service to obtain any additional authorization or permit to provide any communications services that are provided by a provider that holds a franchise pursuant to the Digital Infrastructure and Video Competition Act of 2006 (Division 2.5 (commencing with Section 5800) of the Public Utilities Code), nor may a city or county require such a provider of video or cable service to pay any tax, fee, assessment, or other charge not authorized by the Digital Infrastructure and Video Competition Act of 2006.

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act, within the meaning of Section 17556 of the Government Code.