

ONE HUNDRED FIFTH LEGISLATURE - SECOND SESSION - 2018

COMMITTEE STATEMENT

LB389

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**Hearing Date:** Tuesday February 21, 2017  
**Committee On:** Transportation and Telecommunications  
**Introducer:** Friesen  
**One Liner:** Adopt the Small Wireless Facilities Act

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

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**Vote Results:**

<b>Aye:</b>	5	Senators Bostelman, Briese, Friesen, Hughes, Murante
<b>Nay:</b>	3	Senators Geist, Hilgers, Smith
<b>Absent:</b>		
<b>Present Not Voting:</b>		

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**Verbal Testimony:**

**Proponents:**

Senator Curt Friesen  
Joe Ruggiero  
Kyle Schneweis  
Josh Brodersen  
Bill Mueller

**Representing:**

District 34  
Verizon  
Nebraska Department of Roads  
Self  
AT&T

**Opponents:**

Bob Duchon  
Alan Thelen  
Murthy Koti  
Lash Chaffin  
Chris Dibbern  
Karla Rupiper  
Kristen Gottschalk

**Representing:**

League of Nebraska Municipalities  
City of Omaha  
City of Omaha  
League of Nebraska Municipalities/City of Papillion  
NMPP Energy  
League of Nebraska Municipalities/City of Papillion  
Nebraska Rural Electric Assn and Nebraska Power Assn  
NACO  
Northeast Nebraska PPD  
Nebraska Telecommunications Assn  
City of Lincoln  
Nebraska Cable Communications Assn

Larry Dix  
Vanessa Silke  
Eric Carstenson  
Dvid Young  
Walt Radcliffe

**Neutral:**

**Representing:**

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**Summary of purpose and/or changes:**

Section 1. Title; the Small Cell Wireless Act.

Section 2. Legislative Findings

There is a need for statewide uniformity in the deployment of communications facilities

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Communications facilities are critical to the state

Permitting, construction, maintenance and operation of communications facilities are a matter of statewide concern and interest.

Section 3. The purposes of the act are:

Secure access by the public to advanced wireless technology.

Promote the benefits of wireless technology and provide a reliable process for deployment of small wireless facilities.

Confirm communications service providers and communications facilities providers have a right to occupy and use public rights-of-way.

Section 4-Section 19. Definitions. Key definitions include:

Section 6. "Authority" Means a state agency, county, city, village, public power, district, or other political subdivision of the state.

Section 7. "Communications Facility" means a freestanding tower, monopole, pole, small wireless facility, or other structure used to provide wireless service. The term includes based stations, antenna, coaxial cable, fiber cable, wires, conduit, and any other equipment needed to provide communications services.

Section 15. "Small Wireless Facility" 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 cubic feet in volume.

Section 20. Communications service providers and communications facility providers may place poles and wireless facilities in an authority right-of-way.

In regard to small wireless facilities (SWF), an authority may require an application for a permit to collocate small wireless facilities on poles, including poles owned by the authority.

Applications for the placements of SWF's shall be processed on a non-discriminatory basis and shall be deemed approved sixty days after filing if the authority fails to act.

SWF applications may be filed on a batched basis for projects involving multiple individual SWF within the jurisdiction of an authority.

SWF applications shall be approved unless the application fails to meet relevant constructions standards, or building, electrical, or pole attachment requirements. Such standards must be of general applicability and may not apply exclusively to SWFs.

The authority must document any reason for denial and provide the applicant documentation of the decision on or before the day the application is denied. The applicant is to be provided thirty days to cure the application without the payment of any additional application fees.

Once approved, a SWF permit shall be valid for a period of ten years and shall be subject to automatic renewal for at least three additional five year terms.

An authority may only charge an application fee that is reasonably related to the directly incurred costs of processing the application, and such fee shall not exceed two hundred fifty dollars. The costs of construction shall be borne by the applicant with no additional charges, fees, taxes, lease payments, or in-kind consideration required. An applicant shall not be required to pay the occupation tax prescribed by Section 86-704 for projects done pursuant to the act.

An applicant may collocate SWF on authority poles.

Section 21. SWF shall be permitted for use in all zoning districts, except areas of authority right-of-way that are zoned and used for single family residential use.

Section 22. An authority shall not require a communications service provider or communications facility provider to indemnify or hold harmless the authority from the authority's own negligence or to provide insurance naming the authority and authority personnel as a named party.

A communications service provider or communications facility provider shall be responsible for its own negligence in installing, repairing, or maintaining poles and wireless facilities in an authority right-of-way.

Section 23. Would place the provisions in the telecommunications provisions in the statutes.

Section 24. The bill as introduced has a xxx xx, xxxx operative date.

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**Explanation of amendments:**

AM 1456 would strike the original sections of LB 389 and replace them with the provisions of the amendment.

Section 2 provides legislative findings and declarations.

Sections 3 through 30 are defined terms. Key defined terms include Authority (Section 8), Collocate or collocation (Section 11), Communications service provider (Section 12), Fee (Section 14), Micro-wireless facility (Section 17), Rate (Section 20), Small wireless facility (Section 22), Wireless facility (Section 25), Wireless infrastructure provider (Section 26), and Wireless support structure (Section 30).

Section 31-- applies to activities of wireless providers within the right-of-way and their deployment of small wireless facilities and associated utility poles. Subsection (2) prohibits authorities from entering into exclusive arrangements for the use of the right-of-way. Subsection (3) caps fees as provided in Section 35 if the authority charges other entities for the use of the right-of-way, 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. Subsection (8) states that the authority must 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 32 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 inside 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 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 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 must 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. Subsection (4)(i) states the authority must 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 may not institute a moratorium on filing, receiving, or processing applications or issuing permits. Subsection (4)(m)(i)-(iv) relate to the State of Nebraska and Department of Transportation authority over wireless facilities and wireless support structures. Generally, DOT requirements preempt the provisions of this act. Subsection (5) 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 (6) 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 33 applies to collocations on authority poles and authority wireless support structures that are located on authority property outside the right-of-way (except as provided in Section 38). Subsection (2) provides that an authority shall authorize collocation on authority poles that do not exceed fifty feet and charge fees as allowed under Section 35 and reasonable and nondiscriminatory rates, and requiring only reasonable and nondiscriminatory terms. Subsection (3) states that an authority shall authorize collocation on authority poles higher than fifty feet to the same extent the authority permits access to such structures for other commercial projects or uses. Subsection (4) provides that an authority may not enter into an exclusive agreement with a wireless provider for poles higher than fifty feet, including stadiums and enclosed arenas, unless (a) the wireless provider makes a shared network available to other wireless providers on reasonable terms; or (b) the wireless provider allows other wireless providers to collocate small wireless facilities. Subsection (5) provides factors for determining whether a rate, fee, or term is reasonable.

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

Section 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 (2)(f) provides that the application fee for a utility pole that is not a permitted use pursuant to Section 31 shall not exceed one thousand 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 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 an 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 that complies 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. 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.

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Curt Friesen, Chairperson