F I S C A L I M P A C T R E P O R T

SPONSOR HBICS **ORIGINAL DATE** 2/8/18 **LAST UPDATED** **HB** 38/HBICS

SHORT TITLE Wireless Consumer Advanced Infrastructure **SB**

ANALYST Martinez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY18	FY19	FY20	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		See Fiscal Implications	See Fiscal Implications	See Fiscal Implications	See Fiscal Implications	See Fiscal Implications

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates: SB14

SOURCES OF INFORMATION
LFC Files

Response Received From
Public Regulation Commission (PRC)
Municipal League

SUMMARY

Synopsis of Bill

This bill establishes the Wireless Consumer Advanced Infrastructure Investment Act, which provides for city and county regulation of the timelines, costs and requirements for the placement, timing and cost of small cellular provider facilities on municipal or county infrastructure.

It also allows wireless providers to collocate small wireless facilities in the public right-of-way ("ROW") and install, modify, replace and operate utility poles in the public ROW. Establishes rates, fees, and time frames for applications.

FISCAL IMPLICATIONS

HB38/HBICS requires authorities, specified as cities and counties, to establish rates, fees and terms for connection of small wireless facilities in a public right-of-way. It also prevents an authority from entering into an exclusive arrangement with a wireless provider for the use of a right-of-way.

HB38/HBICS permits an authority (city or county) to charge a rate or fee to a wireless provider for the use of the right-of-way and requires rates or fees to be competitively neutral; charges:

- May not duplicate amounts received from other sources for ROW management;
- May not be unreasonable or discriminatory;
- May not exceed $250 per structure per year.

This bill also permits an authority to require a wireless provider to apply to obtain access to the ROW. Once an application is approved, a wireless provider may deploy structures and facilities in the ROW that do not hinder travel, public safety or other utilities.

HB38/HBICS creates a possible increase in costs to process requests for the siting of small cell facilities for those jurisdictions.

HB38/HBICS permits authority to require an application for the installation of new or modified utility poles or wireless support structures. Applications must comply with all applicable codes relating to public safety, objective design standards undergrounding requirements. Any allowable application fee is limited to $750. It also prevents an authority from entering into an exclusive arrangement with any person for the right to attach to authority utility poles.

HB38/HBICS requires that rates and fees for the collocation of small wireless facilities on authority utility poles be nondiscriminatory regardless of the services provided by collocating person. It also caps the rate to collocate small wireless facilities at a maximum $50 per authority utility pole per year.

SIGNIFICANT ISSUES

The following significant issues were provided by the Municipal League:

The New Mexico Municipal League believes that there is an internal conflict in this legislation in as much as the rates and fees set in this bill are not competitively neutral with other telecommunications providers that have franchise agreements with authorities.

Section 2: provides that a utility pole means a pole or similar structure that is used in whole or in part for various purposes, including traffic signals. This raises public safety concerns about signal interference, access and liability. Additionally, many municipalities throughout the country have determined not to allow small cells, in particular, on their traffic signals.

HB38/HBICS provides that a wireless infrastructure provider means any person who may provide telecommunications service in New Mexico that builds or installs wireless communications transmission equipment, wireless facilities or utility poles. There is a vast difference between a wireless infrastructure provider and a wireless services provider (a person that actually provides wireless services). Wireless infrastructure providers (such as those that want to construct 70 to 120 foot poles in the public rights-of-way) are not a protected class under Federal law. In order to discourage clutter in the public rights-of-way and to mitigate the possibility of companies building poles on speculation (which are categorized as towers under Federal law if they are built for the sole or primary purpose of supporting communications facilities), serious thought needs to be given to requiring the wireless infrastructure providers to have a signed lease in place with a wireless service provider before constructing poles.

The Definitions Section becomes even more concerning when one looks at the definition of "Wireless support structure". That definition not only includes monopoles, but also includes guyed towers and signs. Under this Act, wireless providers could install guyed towers that support small wireless facilities throughout communities.

Section 3: This Section applies to activities within the ROW. It provides that an authority shall not charge a wireless provider a rate or fee for constructing a utility pole unless the authority charges other communications service providers or municipally-owned utilities for corresponding activities. Because communications service providers include cable companies under HB38/HBICS and cable companies are not charged on a per-pole basis, the argument can be made that wireless providers cannot be charged for their activities in the ROW. Also, what if a municipally-owned utility is not charged for its use of the ROW? Additionally, pursuant to HB38/HBICS, the rate or fee shall not exceed an annual amount equal to $250 multiplied by the number of small wireless facilities placed in the ROW. It is unclear if a new utility pole with multiple small wireless facilities considered one facility and therefore only subject to a $250 rate, also unclear is if upward adjustments for inflation are allowed.

In HB38/HBICS, in-kind contributions (fiber, conduit, etc.) cannot be required nor can an authority require more information for a permit from a wireless provider than it asks of a cable company.

Per this Section of the Act, a wireless provider (which would include companies such as Mobilitie) may, as a permitted use, and not subject to zoning review or approval, collocate small wireless facilities and construct utility poles associated with collocation in the ROW. There are no stealth requirements. The wording in this Section seems to indicate that authorities may not regulate the installation of utility poles. This could create significant issues for authorities if they cannot invoke public safety or design requirements for the use of their own property. Authorities need to have the ability to reasonably regulate the attachment of small cells and the construction of utility poles in residential and downtown districts.

HB38/HBICS does contain some favorable language dealing with a wireless provider's or its contractor's responsibility to return property to its pre-damaged condition according to the authority's requirements and specifications, if the requirements and specifications are reasonable and competitively neutral. The reimbursement language does need to be expanded to include, for example, attorneys' fees and costs.

The proposed legislation enables authorities to adopt reasonable regulations concerning the separation of utility poles and small wireless facilities from other utility facilities to prevent damage or interference. It is unclear on what is deemed reasonable (50', 100', 500', etc.).

HB38/HBICS also contains language regarding small wireless facilities in historic districts. The authority may require reasonable, technically feasible, non-discriminatory and technologically neutral designs or concealment measures to conform to the aesthetics of the historic district as long as those measures do not have the effect of prohibiting a wireless provider's technology.

HB38/HBICS also requires a wireless provider to notify an authority in writing if it intends to discontinue using a small wireless facility or utility pole. The provider is responsible for the cost

of removal. If the provider does not complete the removal within 45 days of the notice, the authority may complete the removal and assess the cost against the wireless provider. This provision needs to be broadened to include attorneys' fees.

Section 4: This portion of HB38/HBICS applies to a wireless provider's collocation activities within the ROW. A small wireless facility that is collocated on a utility pole or wireless support structure that extends 10 or fewer feet above the structure in any zone is classified as a permitted use and is not subject to zoning review or approval. This concept is extremely concerning for local governments. In essence, if the antenna does not exceed 10 feet above a pole. It is unclear if this will allow a wireless provider to install an equipment cabinet that is 28 cubic feet on the pole or at the base of the pole.

Additionally, the application requirements are minimalistic. Applications for a permit should at least include drawings, site plans, photo simulations, methods of ingress and egress, statements of compliance with the FCC's RF emission requirements, bonds or letters of credit to ensure removal of abandoned facilities and certifications from New Mexico structural engineers.
Regarding the shot clocks, under Federal law, an application is "deemed granted" for Section 6409(a) applications (see the Middle Class Tax Relief and Job Creation Act of 2012 - Eligible Facilities Requests under 47 U.S.C. § 1455(a)) if the 60 day shot clock has expired and the applicant thereafter notifies the authority in writing. There is no "deemed granted" remedy under Federal law for failure to act on a collocation application under 47 U.S.C. Sec. 332(c) (7) (the 90 day shot clock) or new sites or towers (the 150 day shot clock). Under the proposed New Mexico legislation, if an authority fails to act on a collocation application, the application is deemed approved after 90 days. This goes beyond Federal law. Per HB38/HBICS, an authority must approve a completed application unless the application does not conform with various requirements. Stealth and concealment requirements must be reasonable.

Further, under HB38/HBICS, during the 90 day period after an authority receives a collocation application, the authority may provide public notice. That burden should fall upon the wireless provider instead of local governments.

If an application is denied, the applicant may resubmit within 30 days for no additional fee. The authority only has 30 days to approve or deny the revised application. For batched applications for the collocation of multiple small wireless facilities, the authority may issue separate permits for those it approves.

The Industry's proposed legislation will not allow authorities to institute a moratorium on processing applications or issuing permits for the collocation of small wireless facilities. Again, this runs contrary to Federal law. Although a moratorium would not toll the running of a 60 day shot clock under Section 6409(a), an authority could issue a moratorium on a collocation request under Section 332(c)(7) as it pertains to the 90 day shot clock so long as the length of the moratorium does not exceed 90 days.

HB38/HBICS does not allow an authority to require a permit or require fees or rates for the installation of a micro wireless facility that is suspended on cables that are strung between utility poles. In essence, this means that authorities will not be able to charge cable companies for deploying small wireless facilities between poles.

The proposed legislation will allow wireless infrastructure providers to warehouse permits.

Section 5: This Section deals with a wireless provider who wants to install a new, replacement or modified utility pole associated with collocation in the ROW. That activity is not subject to zoning review and approval except for some underground prohibitions and height limitations.

HB38/HBICS has the potential to result in the installation of 50 foot utility poles in sensitive zoning areas. A requirement to file an application will not solve this problem. The criteria for denial is confusing (see lines 5-13 on page 19 of HB38/HBICS). It is concerning that a pole 50 feet in height could be placed in close proximity to residences without break-point technology requirements. The responsibility should be placed on wireless providers to ensure the public safety of your constituents and further indemnify and hold harmless citizens from damage to persons or property that may result in the event of a structural failure.

The legislation includes a "deemed granted" remedy for failure to act on an application for a new utility pole within 150 days. As noted above, this exceeds Federal requirements. The application fee shall not exceed $750. Installation is to commence within 180 days but there is no completion date.

Section 6: The rate to collocate on an authority utility pole shall not exceed $20 per utility pole per year. We believe that this rate is inadequate to compensate an authority.

Section 7: An authority may adopt an ordinance to implement HB38/HBICS. However, the ordinance will need to comport with HB38/HBICS. As for the use of authority utility poles, clarification is needed as to whether the wireless provider will pay for the reasonable accommodation of a power supply to, and electric metering of, the small wireless facility.

Section 8: The beginning of Section 8 is an attempt by the Industry to make it appear that an authority may exercise its zoning, land use, planning and permitting authority and its police power for the installation of wireless support structures and utility poles. The reason that this Section does not help is that it is caveated by whatever else is in SB 14. Further under this Section, a political subdivision may not require small wireless facility deployment.

Section 9: There is a carve-out in the proposed legislation for investor-owned electric utilities and electric cooperatives. They can determine their own fees, rates, terms and conditions for use of their utility poles or wireless support structures.

The following significant issues were provided by the Public Regulation Commission:

All of the major wireless providers such as Verizon, Sprint, AT&T and T-Mobile are preparing to roll out "5G" wireless services, which require dense deployment of small wireless devices in populated areas such as cities and towns. These services use high frequency bandwidth spectrum capable of transmitting a lot of data but with a limited range. This has provided the impetus at the FCC and through state legislation or state rules to simplify the deployment process for these facilities.

The FCC has an ongoing proceeding to address this issue for the siting of wireless facilities in WT Docket 17-84, and has already ruled on the process for pole replacements under the historic review process under the National Historic Preservation Act in WC Docket 17-79. Any proposed

actions by the FCC would likely provide for the limitation of costs, processes, and the setting of right-of-way timelines as this bill proposes.

There is a question whether the FCC's proposed actions will conflict with the actions proposed in this bill and if it would pre-empt state, municipal, or county law. It is unsettled legally and a matter of controversy in federal and state courts.

The FCC currently has rules for access to poles ducts, and rights of way, that states may elect to regulate in lieu of the FCC for poles, ducts and rights of ways through a state rulemaking. However, it is not clear whether this applies to the use of rights of way in the placement of wireless facilities, or facilities owned by county or municipal governments. New Mexico is not one of those states that have elected to regulate poles, ducts, or rights of way.

DUPLICATION

Duplicates SB14

ADMINISTRATIVE IMPLICATIONS

The following administrative implications were provided by the Municipal League:

HB38/HBICS then takes up the concept of filing consolidated applications and receiving a single permit for the collocation of up to 25 small wireless facilities, all of which are substantially the same type. How is a small community going to handle that many sites in a very short time period?

Application fees are minimalistic ($100 or less for each of up to 5 small wireless facilities and $50 or less for each additional small wireless facility whose collocation is requested in a single application). It is very likely that the application fee will not cover the costs of the authority to process the applications.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

County and municipal jurisdictions will continue to control the timing and cost of the deployment of wireless facilities on their facilities barring pre-emptive action by the FCC or the state.

JM/jle/al