Approved: April 11, 2002 Carl Dean Holmes
Date

MINUTES OF THE HOUSE COMMITTEE ON UTILITIES.

The meeting was called to order by Chairman Carl D. Holmes at 9:10 a.m. on March 13, 2002 in Room 526-S of the Capitol.

All members were present except: Representative Annie Kuether

Committee staff present: Robert Chapman, Legislative Research
Dennis Hodgins, Legislative Research
Mary Torrence, Revisor of Statutes
Jo Cook, Administrative Assistant

Conferees appearing before the committee: Kim Gulley, League of Kansas Municipalities
Don Moler, League of Kansas Municipalities
Rachel Reiber, Everest Connections
Senator Karin Brownlee
Rob Hodges, Kansas Telecommunications Industry Association
David Corliss, City of Lawrence
Michael Santos, City of Overland Park

Others attending: See Attached List

Representative Long moved to approve the minutes for the January 28, January 29, February 4, and February 5 meetings. Representative Dreher seconded the motion. Motion carried.

SB 397 - Access to public right-of-way by telecommunications providers

Chairman Holmes opened the hearing on **SB 397** and welcomed Kim Gulley, League of Kansas Municipalities, who provided a detailed explanation of the bill (Attachment 1).

Don Moler, Executive Director of the League of Kansas Municipalities, addressed the committee in support of **SB 397** (Attachment 2). Mr. Moler detailed the history that led to the introduction of the proposed legislation. He stated that after nine meetings the parties involved were able to reach an agreement and that any modification could lead to support being withdrawn from one or both sides. He also said that although other industries have expressed interest in this legislation, the work was done in the context of the 1996 Federal Telecommunications Act and the existing statutory framework.

Rachel Reiber, Vice President of Regulatory and Government Affairs for Everest Connections, appeared in support of **SB 397** (Attachment 3). Ms. Reiber provided background information on her company and told of their involvement in negotiations. She urged the committee to pass the bill as it is written.

Senator Karin Brownlee, 23rd District, testified in support of **SB 397** (Attachment 4). Senator Brownlee shared the history of the legislation and asked the committee to honor the difficult work both sides engaged in to arrive at the compromise by passing the bill out with no changes.

Rob Hodges, President of the Kansas Telecommunications Industry Association, spoke in support of **SB 397** (Attachment 5). Mr. Hodges stated that the bill was drafted with two distinct parts: the franchise portion and the right-of-way portion. The franchise portion addresses municipality choice and the fee structure. The right-of-way portion addresses to whom the bill applies to, fees on rights-of-way, and administration.

David Corliss, Assistant City Manager for the City of Lawrence, testified in support of **SB 397** (Attachment 6). Mr. Corliss stated the City of Lawrence accepts the compromise bill and would oppose any substantive amendments.

Michael Santos, Senior Assistant City Attorney for the City of Overland Park, shared comments supporting **SB 397** (Attachment 7). Mr. Santos urged the adoption of the bill with no changes.

MINUTES OF THE HOUSE COMMITTEE ON UTILITIES, Room 526-S Statehouse, at 9:10 a.m. on March 13, 2002.

Written testimony in support of **SB 397** was submitted by: Don Siefert, City of Olathe (Attachment 8); Eric Arner, City of Lenexa (Attachment 9); Michelle O'Neal, Southwestern Bell Telephone Company (Attachment 10); and Mike Murray, Sprint (Attachment 11).

The conferees responded to questions from the committee.

Chairman Holmes closed the hearing on **SB 397**.

HB 2100 - Unsolicited consumer telephone calls; do-not call list

Chairman Holmes opened the debate on **HB 2100**.

Representative Myers moved to adopt a proposed substitute, previously distributed, that includes suggested industry language. Representative Merrick seconded motion.. Representative Sloan addressed proposed amendments, previously distributed, and stated they could be added at any time, at the discretion of the committee. Mary Torrence, Revisor of Statutes, detailed the proposed substitute, explaining the differences between the substitute and the current version of **HB 2100**. Colleen Harrell, Assistant General Counsel for the Kansas Corporation Commission; Steve Rarrick, Assistant Attorney General; and Doug Smith, on behalf of the Direct Marketing Association, responded to questions from the committee on the proposed substitute. On Call of the Question, motion carried. Representative Myers distributed a memorandum from Steve Montgomery of MCIWorldcom that addressed concerns about constitutional challenges (Attachment 12).

Chairman Holmes announced we would have a hearing on **SB 490** tomorrow, then take up the **Substitute for HB 2100**.

The meeting adjourned at 10:55 a.m.

The next meeting will be March 14, 2002.

HOUSE UTILITIES COMMITTEE GUEST LIST

DATE: March 13, 2002

NAME	REPRESENTING
Rob Hodges	KTIA
Michelle O'neal	SWBT
Pat Referman	City of Geneva
Joe Dirk	KCKBPU
Jody Boeding	Wyandotte County / KC, KS
	LKM
DAVE CORLISS	CITY OF LAWRENCE
	KCTA
Don Seifert	City of Olathe
Mike Sanders	Overland Park
Robert Knapp	INK 1
Mike Murray	Sprint
Susan Mahoney	Gov's Office
Mary Peters	Sprint
Patricia Scott	Sprint
Carolyn Gaston	Sprint
Rachel Reiber	Everest
STEVE GAUL	EVEREST
Nelson Krueger	Everest
Colleen Harrell	KCC

HOUSE UTILITIES COMMITTEE GUEST LIST

DATE: March 13, 2002

NAME	REPRESENTING
Doug Smith	Dehart Darr & Associates
STEVE RARRICK	ATTORNEY GENERAL
Jim Gaertner	SWBT
ED SIMS	SWBT
TIM PICKERING	SBC - Southwestern Bell (SWBT)
Tom Gleason	Independent Telecom Group
Ernest Kutzley	AARP

SB 397 Overview

prepared by
Kim Gulley, League of Kansas Municipalities

Section 1. **Amends K.S.A. 12-2001** dealing with franchises. The following subsections are changes to the current law.

(a)(3) Removes telecommunications providers from the initial list of franchisees. Telecommunications-specific provisions are included in 12-2001 beginning at subsection (c) and running through subsection (r) of the bill.

(a)(4) Removes reference to telecommunications providers.

(a)(5) The deletion of "annually" allows the city and the franchisee to agree on a payment schedule. This is consistent with similar language in the telecommunications sections.

(a)(6) **Streamlined franchise process.** This change removes the three-reading requirement and removes the waiting period and possible referendum for an initial franchise. However, the referendum portion is included in subsection (m) as it applies to an increase in the local franchise fee. Publication costs would continue to be paid by the proposed grantee.

(c) - (r) Telecommunications-specific language to be added to K.S.A.12-2001.

(c) **Telecommunications-specific definitions** including "access lines," "gross receipts," "local exchange service," "telecommunications local exchange service provider," and "telecommunications services" (from the 1996 federal Telecommunications Act).

(d) **Contract Franchise Ordinance.** Authorizes a city to require telecommunications local exchange providers to enter into contract franchise ordinances. Such ordinances cannot be denied or revoked without notice and a public hearing. There is also an appeal to district court allowed for such revocation or denial.

(e) **Franchise Limitations.** These limitations are similar to the ones found in K.S.A.12-2001(b)(1) which applies to all franchisees. 1) contract franchises must be adopted by ordinance; 2) there is a limit of 20 years; 3) such contract franchise ordinances may not be exclusive; 4) contract franchises become effective as provided by law (K.S.A. 12-3001 *et seq.*) and the publication expense is paid by the grantee; 5) cities may not include provisions relating to the content, nature, or type of communications service or quality of service in a contract franchise.

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(f) **Reporting and Payment of Fee.** Requires quarterly reporting and payment of the franchise fee, or in a time frame as agreed to by the parties.

(g) **Application Fee.** Authorizes an application fee to be charged by the city.

(h) **90-Day Limitation.** Requires cities to submit a completed application for a contract franchise to the governing body for a final vote within 90 days.

(i) **Regulation Limitation.** Prohibits cities from regulating a telecommunications provider based on the content, nature or type of telecommunications service or quality of service when considering a franchise application.

(j) **Franchise Fee Computation.** Subsection (j) authorizes cities to choose an access line fee with a maximum of $2.00 per access line. This amount grows over time to a maximum of $2.75 in 2012.

(1) Calculation and Dispute. Establishes how access line charges are calculated and how disputes are resolved.

(2) Gross Receipts Fee. Authorizes a gross receipts fee which is capped at 5%. Also establishes how the gross receipts fee is calculated and how disputes are resolved.

(k) **Unexpired Franchises.** Establishes that payment under an existing unexpired franchise will satisfy the fee requirements of this bill.

(l) **Fee Increase.** Authorizes cities to consider an increase in franchise fees every 36 months.

(m) **Referendum.** Establishes the process for increasing the access line fee or gross receipts fee. Provides for notice, publication; a 60-day waiting period; and a possible referendum on the issue.

(n) **Resellers.** Establishes the application of fees to resellers.

(o) **Limitations on Local Regulation.** Provides that cities may not regulate in the following ways:

(1) Cannot require a business office to be located in the city;
(2) Cannot require reports not related to the compensation required in the contract franchise ordinance;
(3) Cannot require business records except as they pertain to the fees;
(4) Cannot require city approval of transfers of ownership, etc. except that a city may require current point of contact information;
(5) Cannot regulate as to quality of service.

(p) **Confidential Information.** Makes it clear that information required pursuant to this act is confidential.

(q) **Existing Franchises.** Provides that existing franchises will continue for their expired term so long as: 1) it does not include a linear foot charge and/or a minimum fee; 2) it was enacted prior to the effective date of this legislation; 3) it was agreed to by the telecommunications providers. New entrants must be offered franchise relationships on a competitively neutral and non-discriminatory basis.

(r) **Fee Pass Through.** Requires a mandatory pass-through of franchise fees on customer's bills.

(s) **Telecommunications Only.** Makes it clear that sections (c)-(r) apply only to telecommunications local exchange providers.

Section 2 amends K.S.A. 17-1902 dealing with Rights-of-Way. SB 397 removes all current language and establishes the following new sections:

(a) **Definitions.** Defines terms including "right-of-way," "providers," and "competitive infrastructure providers." **N.B.: section 1 applies only to telecommunications local exchange providers, while section 2 applies to all providers.**

(b) **Right of Access.** Gives telecommunications providers access to public rights-of-way.

(c) **Limitation on Use of Public Property.** Establishes that the right of access applies only to public rights-of-way and not to other public property.

(d) **Home Rule.** Establishes that right-of-way usage by telecommunications providers is subject to and subordinate to the reasonable health, safety, and welfare regulations of cities. Cities may exercise their home rule powers so long as it is done so in a competitively neutral manner. Makes it clear that SB 397 is not intended to limit the ability of a city to regulate and/or franchise competitive infrastructure providers.

(e) **Specific Portions of the ROW.** Authorizes cities to prohibit the use of a specific portion of the right-of-way so long as the prohibition is necessitated by health, safe, and welfare and is imposed in a competitively neutral manner.

(f) **Denial of Request Pertaining to a Specific Portion of ROW.** Provides notice, an opportunity for hearing, and an appeal to district court if a city denies the use of a specific portion of the right-of-way.

(g) **Rules and Regulations.** Establishes that providers must comply with the right-of-way rules and regulations of the city.

(h) **Limitation on Regulations.** Establishes certain limitations on right-of-way regulations (similar to (o) in section 1).

(i) **30-Day Limitation.** Establishes a 30-day limitation for dealing with an administratively complete right-of-way permit application.

(j) **Emergency Work.** Authorizes providers to do emergency work and repair in the right-of-way so long as the city is notified as soon as possible.

(k) **Damages to ROW.** Requires providers to repair the right-of-way to its functional equivalence. If the provider fails to do so, the city may make the repair and charge the provider.

(l) **Relocation.** Authorizes cities to require relocation of providers' facilities for certain public projects.

(m) **No Barrier to Entry.** Prohibits cities from establishes regulations which are a barrier to entry for providers.

(n) **ROW Management Fees.** Authorizes the following right-of-way fees so long as the are imposed on a competitively neutral, non-discriminatory basis: 1) permit fee; 2) excavation fee; 3) inspection fees; 4) repair and restoration costs; 5) performance bonds.

(o) **Additional Fees.** Prohibits any additional right-of-way fees.

(p) **Taxation.** Makes it clear that this legislation is not intended to affect the valid taxation of providers.

(q) **Indemnification.** Provides indemnification for cities with respect to a provider's use of the right-of-way.

(r) **Claims.** Requires prompt notification of claims.

(s) **Franchise Fees.** Makes it clear that nothing in section 2 is intended to affect franchise fees required in section 1.

(t) **Right-of-Way Management Ordinances.** Requires that right-of-way management ordinances may not conflict with the provisions of this act.

Section 3 **Non-Severability Clause.** Requires that if any portion of this bill is struck down, the entire bill is invalidated.

LKM
League of Kansas Municipalities

300 SW 8th Avenue
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Phone: (785) 354-9565
Fax: (785) 354-4186

To: House Utilities Committee

From: Don Moler, Executive Director

Date: March 13, 2002

Re: Support for SB 397

As provided in HB 2515, representatives of the cities of Kansas met with representatives of the telecommunications industry to discuss issues which arose in the context of Sub. SB 306.

In all we held nine face to face meetings between the telecommunications industry representatives and the representatives of cities in Kansas. I would estimate that in these nine meetings we met for approximately 36 hours of discussion of these incredibly complex and multifaceted issues. The complexity and difficulty of the issues became ever clearer as we continued to work through the proposed legislation and the issues which it presents.

Depending on size and geographic location, the issues which are most salient to individual cities will vary given local circumstances. Similarly, it is our perspective that the telecommunications companies come at the issue in a multitude of ways as a result of their company's history and the services that they are now providing or wishing to provide. As a result of the very diverse group of participants in this process, the process has been challenging and exceedingly time intensive. While we have met in face to face negotiations for roughly 36 hours over the summer and fall, I would estimate that literally hundreds of staff hours have been expended by both sides in attempting to focus the issues and develop language which will meet the needs of all of the interested parties.

With this said, I am very happy to report that at our ninth meeting in Overland Park, the parties were able to reach an agreement on language concerning franchise agreements and the use of the public rights of way. As I am sure you know, this compromise legislation carefully balances the needs of cities and the public with the needs of the telecommunications industry. It has been carefully crafted so as to address major concerns of both sides of this issue. It is imperative, we believe, that the legislation be considered as a package. Modification, removal, or addition of any language could well upset the delicate balance that has been struck in the proposed legislation you have before you today. I would caution that any attempt to modify or significantly change this

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language could well lead to a very difficult situation in which one or both sides could choose not to support the legislation. That would be a shame given the amount of time and effort that has been put into this process.

The League of Kansas Municipalities, through the action of our governing body on December 13, 2001, unanimously voted to support the language contained in the bill you have before you. We are proud of our cities and the work and effort they have put into this product as well as their willingness to meet with the telecommunications industry on this issue. We certainly hope that the Committee will embrace the work which has been done and recommend it favorably for passage. There are three aspects of this bill that are especially critical for cities: 1) franchise authority; 2) fees which adequately compensate the public for use of the right-of-way and which grow over time; and 3) control and management of public rights of way. We believe that SB 397 offers a balance which preserves these key issues for cities.

I know that representatives from a number of other industries have expressed an interest in this legislation. However, it is important to remember that this negotiation and subsequent work product were done in the context of the 1996 Federal Telecommunications Act and the existing Kansas statutory framework. Other industries have their own unique statutory and regulatory systems and should not be simply lumped into this piece of legislation.

For example, the cable industry has its own federal and state statutory scheme which differs from that the telecommunications industry. The electric industry operates largely as a regulated monopoly and must be addressed accordingly. We believe that it would not be productive or prudent to include other industries in this very specific piece of legislation. We are more than willing to sit down with representatives of any other industry who is interested in discussing issues related to city governments. However, we are strongly opposed to doing so in the context of a recommended piece of legislation which has been negotiated with an industry according to a very specific federal act.

In conclusion, I would like to thank Rob Hodges for his commitment to this process. While the meetings were challenging, I think we accomplished two important goals. First, both sides of this issue have a much greater understanding of the various interests that are at stake in these very important issues. Second, I believe our work product represents a true compromise piece of legislation and we appreciate the wisdom of the legislature for giving us the opportunity to work out these issues in this fashion. Thank you very much for allowing the League to appear here today. I will be happy to answer any questions the Committee might have.

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Testimony of
Rachel Lipman Reiber
Vice President of Regulatory and Government Affairs
Everest Midwest License, LLC dba Everest Connections
4740 Grand, Suite 200
Kansas City, MO 64112

In Favor of S.B. 397
March 13, 2002

I am Rachel Lipman Reiber, Vice President of Regulatory and Government Affairs for Everest Midwest Licensee, LLC dba Everest Connections. Everest is a broadband service provider. Everest provides dial tone, 911 connectivity and a full complement of CLASS features, such as caller ID, call waiting call forwarding, etc. In addition Everest offers 300 analog and digital cable channels and high speed Internet service at up to 3.0 Mbps downstream with all of these services delivered over a hybrid fiber coaxial architecture, which we extend to each home. Everest appears here today to testify in favor of S.B. 397, and to urge you to pass this legislation "as is," since it is the product of more than 30 hours of negotiation and compromise by both the cities and the telecommunications companies.

Everest would not exist today if it weren't for the Cable Act of 1992 and the Telecommunications Act of 1996. Both of these Congressional Acts were designed to promote competition so that the marketplace would bring to consumers more choice, lower prices and better service. While some new entrants in the telecommunications sector operate under business plans that lease the facilities of incumbent providers, Everest is what is known in the industry as a facilities-based provider. Building our own infrastructure allows us to differentiate ourselves from other participants in this sector. However, it requires that we obtain a franchise from municipalities that we traverse as well as those where we currently offer service.

Everest turned up its first customers on January 25, 2001, in Lenexa, Kansas. The reason we started in the City of Lenexa was that the city welcomed us and did not seek to require us to adhere to franchise terms and conditions that were onerous for new market entrants. But our negotiations for telecommunications franchises with many of the cities in the Kansas City metropolitan area were stymied. With the passage of H.B. 2515, we were able to use its moratorium to make use of existing franchises for the period ending July 1, 2002, while we sought to hammer out modifications to the century old statutory scheme governing franchises and use of the rights of way. Neither the statutes in Chapter 12, governing franchises, nor the statutes in Chapter 17, governing utility use of the rights of way, envisioned a world of multiple providers of telecommunications and cable services.

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After six months of face-to-face meetings and many additional hours of conference calls for both League members and telecommunications companies, the end result is S.B. 397. Everest is delighted with the end result and believes S.B. 397 represents a fair compromise between cities and the industry. The cities preserved their right to administer the right of way in a competitively neutral manner as prescribed by Sec. 253 of the Telecommunications Act of 1996. Cities are also guaranteed a revenue stream from franchise fees that has a potential for growth over time. The industry, which deals with numerous municipalities throughout the state, believes that S.B. 397 brings uniformity to the franchising process and ensures that fees collected for right-of-way use are cost based. As a new entrant, Everest is pleased that in-kind infrastructure requirements are prohibited and that so-called "minimum franchise fees" are eliminated. Under S.B. 397, Everest will remit franchise fees based on the number of subscribers we have, not the number of linear feet of the right of way we occupy.

S.B. 397 does not advantage telecommunications providers over other utilities; it simply recognizes that the franchise and rights of way statutes, which have been in place since the early 1900s, needed to be updated to recognize that the telecommunications and cable industries no longer deliver their services over a monopoly infrastructure.

S.B. 397 represents a delicate balance of the interests of the cities and the industry, as well as the viewpoints and concerns of individual parties within those groups. Modification will put at risk the compromises made by all parties. We cannot afford to return to the animus between the parties and the chaos that existed in this area of the law at this time last year. Everest urges you to pass S.B. 397 "as is."

3-2

STATE OF KANSAS

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SENATOR, 23RD DISTRICT
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SENATE CHAMBER

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COMMERCE, CHAIRPERSON
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TESTIMONY FOR SB 397

HOUSE UTILITIES COMMITTEE

MARCH 13, 2002

SB 397 is a success story to date of how the legislative process should work. This bill reflects two different groups who started with divergent views but labored until an agreement was forged. Knowing where the telecommunications companies and the cities started and seeing this finished product, it is clear that each group gave up some of their tightly held positions.

Some history on this topic might be helpful for you. In 1996, the Federal Telecommunications Act was passed which included a provision that there not be barriers to entry for competitive telco companies. If a competitor cannot place their infrastructure in the ground to deliver telecom services, they obviously cannot compete. More recently, Mid America Regional Council (MARC) created a model ordinance which some cities began to adopt; it included some rather onerous provisions for telcos. Please keep in mind that telcos are unique as users of ROW as they are the only entity which can now come in multiples. Typically, there is one supplier of natural gas, electricity, etc. in a community. This requires a bit different treatment than the other utilities in a ROW.

At the beginning of the 2001 session, several telcos approached me about addressing this issue legislatively as some of these companies were experiencing long delays in their attempts to negotiate entry into some Kansas communities. Realizing this is an issue in other states, I thought it was appropriate for the Kansas Legislature to consider this topic. The starting point was that telcos wanted to secure a certificate of convenience from the KCC and 'go to town.' The cities wanted to be able to control who was unloading backhoes within their city limits and when. The telcos were concerned that fees charged by the cities could become too high (remember consumers pay these fees) and cities wanted to protect the revenue stream that franchise fees provide. At one point, one city even suggested that an ISP should be paying franchise fees. The differences were significant and the steps toward the middle could be measured in millimeters.

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The Senate Commerce committee approved a substitute bill for SB 306 and was prepared to run the bill on the Senate floor when an agreement was reached with the cities and the telcos to have a moratorium for a year on new city ordinances in this area while the two sides could come to an agreement. The two sides spent many hours in the interim debating their positions and reported progress to the Joint Committee on Economic Development.

The finished product (SB 397) indicates that cities maintain their right to a franchise agreement and have renamed this agreement a 'contract franchise' which is quite fitting. The telcos will be paying fees such as an application fee and others but they should have a decision from each city within 90 days. The revenue for the cities will be protected and cities can choose between an access line fee or gross receipts fees as the basis for the franchise fee. Both of these options come with caps and an inflation factor. The bill addresses how prior franchise agreements will be addressed. Telcos will be responsible for to repair damage and liability issues are also covered.

We made some small changes in the Senate Commerce committee but otherwise honored the difficult work which both sides engaged in to arrive at this compromise. I would urge you to do likewise. Thank you for your time and attention.

4-2

KTIA

Legislative Testimony

Kansas Telecommunications Industry Association 700 SW Jackson St., Suite 704, Topeka, KS 66603-3758 V/TTY 785-234-0307 FAX 785-234-2304

Before the House Committee on Utilities

SB 397

March 13, 2002

Good morning, Chairman Holmes and members of the committee. I am Rob Hodges, President of the Kansas Telecommunications Industry Association. I appear today on behalf of an industry task force that includes representatives from Southwestern Bell, Sprint, AT&T, and Everest Connections.

Historically, those companies and, indeed, our entire industry, have enjoyed a good relationship with municipalities in Kansas. It is that continuing good relationship with people in municipal governments that caused the rural telephone companies to adopt a position of neutrality in the negotiations that resulted in the drafting of SB 397, and on the bill itself.

According to HB 2515, enacted last session, representatives of municipalities and telecommunications providers were required to confer and provide progress reports to the joint committee on economic development regarding franchise and right-of-way ordinances. We fulfilled that requirement and the result of our negotiations is SB 397. We appear today to ask you to report the bill favorably for passage.

SB 397 contains many provisions that are important to the telecommunications industry. The bill would codify many of the provisions of existing franchises between providers of local telecommunications services and municipalities, while incorporating changes to reflect the competitive telecommunications marketplace and provisions of the federal telecom act of 1996.

SB 397 is drafted with two distinct parts:

- Section 1, beginning on page 1, would amend K.S.A. 12-2001 and is the "franchise" portion of the bill. That section would apply to providers of <u>local</u> telecommunications service.
- Section 2, beginning on page 10 in line 34, would amend K.S.A. 17-1902 and is the "right-of-way" portion of the bill. Section 2 pertains to <u>all</u> providers of telecommunications service, local and long distance.

When SB 397 is enacted:

- municipalities may choose to require that providers of local telecommunications service enter into contract franchise ordinances [page 6, line 1];

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- municipalities could impose:
  - a per-access-line fee [page 7, line 15],
  - a gross receipts fee [page 7, line 43], or
  - no fee at all;
- any fee imposed would be required to be passed through to local customers in that municipality [page 10, line 26];
- fees and contract franchise requirements would have to be competitively neutral [page 6, line 8; page 7, line 39; page 8, line 24]; and
- restrictions would be placed on what a municipality could require in its contract franchise ordinance [page 6, line 15 and page 9, line 29].

In the right-of-way portion of the law [Section 2 of the bill beginning on page 10, line 34]:

- the provisions of the bill would apply to all "providers" that occupy a public right-of-way [page 11, line 3];
- any fees imposed by a municipality on telecommunications occupants of the right-of-way would be cost-based and applied in a competitively neutral manner [page 13, line 32]; and, similarly,
- administration of a municipality's public right-of-way would be required to be competitively neutral [page 11, line 31].

The process of negotiation that resulted in the language of SB 397 was both lengthy and detailed. That process required a great deal of education as each of the participants became more familiar with the points that other negotiators considered to be important.

The result, SB 397, is both a good compromise and a delicate balance. We encourage the members of this committee and all legislators to examine both the language and the concepts contained in the bill. We hope that you will ask the parties involved in the negotiations if you have questions.

At the end of your deliberations we believe that you will find SB 397 to be good public policy and that you will recommend the bill favorably for passage. We ask that you do so.

City of Lawrence
KANSAS

MIKE WILDGEN, CITY MANAGER

CITY OFFICES 6 EAST 6th
BOX 708 66044-0708 785-832-3000
TDD 785-832-3205
FAX 785-832-3405

To: Members of the House Utilities Committee
From: David Corliss, Assistant City Manager & Director of Legal Services
Date: March 13, 2002
Re: City Right-of-Way/Telecommunications SB 397

The City of Lawrence supports the provisions of the compromise bill worked out during the negotiations between municipal officials and representatives of the telecommunications industry during the past interim. As with all compromises, there are provisions in the compromise bill that city officials do not believe are in the best interests of our communities. Telecommunications industry representatives will likely voice a corresponding concern regarding provisions they dislike. However, given a choice between legislation considered last year and the compromise bill, the City of Lawrence prefers and accepts the compromise bill. The City of Lawrence specifically opposes any substantive amendments to the compromise bill.

City control and management of city owned right-of-way is essential to protect city infrastructure and avoid disruption to a community's quality of life. Adequate compensation to the public for the use of publicly owned right-of-way is a significant revenue source for cities - providing funds for essential municipal services and programs. The franchise/contracting authority for cites is a significant requirement to ensure that both of these interests are preserved.

The City of Lawrence is prepared to provide any additional information to the Committee it may desire on this topic. We can detail our interests in the various provisions of the compromise bill as necessary. Thank you for the opportunity to provide testimony today.

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The City of Overland Park KANSAS

Law Department
Robert J. Watson, City Attorney

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March 13, 2002

TO: Chairman Carl Holmes and Members of the House Utilities Committee

FROM: Michael Santos, Senior Assistant City Attorney

RE: Senate Bill 397

Thank you for the opportunity to share the City of Overland Park's comments regarding Senate Bill 397.

Cities have long had the responsibility for managing the orderly, efficient and safe use of the public rights-of- way. Effective right-of-way management has historically preserved for all Kansans the finite resources of this public asset and protected the health, safety, and welfare of our citizens. As demand for use of the public rights-of- way increases, Kansas cities have a greater need for effectively regulating this often crowded and limited public resource.

Senate Bill 397 is the direct product of the substantial efforts of both Kansas cities and the telecommunications industry to find common ground on complex issues of great importance to both sides. Many long meetings, consisting of frank and often impassioned negotiations, led to a better understanding of each party's interests, which in turn led the parties to acceptable compromise.

The City of Overland Park accepts the compromise reached between Kansas municipalities and the telecommunications industry as set forth in Senate Bill 397. Given the delicate balance struck between the interests of both parties and the extensive time invested in reaching this compromise, the City of Overland Park urges adoption of SB 397 without substantive changes.

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City of Olathe

MEMORANDUM

TO: Members of the House Utilities Committee

FROM: Donald R. Seifert, Policy Development Leader

SUBJECT: Senate Bill 397; Telecommunications Providers/Right of Way Use

DATE: March 13, 2002

On behalf of the city of Olathe, thank you for the opportunity to provide a statement in support of SB 397. This bill represents the product of a working group of city and telecommunications providers charged with following the legislature's direction last year to reach a compromise on what had become a very contentious issue. The city appreciates the willingness of the legislature to step back and provide a window of opportunity to develop this landmark legislation outside the time constraints of the session. We also greatly appreciate the hard work, countless hours, and diligent efforts of all the participants from both sides in reaching this point.

Cities are so concerned about this issue because management of local right of way is a core function of the business of local government. Almost all basic local government services: public safety, transportation, and utilities, depend on the public right of way for service delivery. As stewards of public property, city officials view right of way management very seriously.

Yet at the same time, city officials are cognizant of the unique, competitive business environment under which telecommunications companies operate. No other users of local right of way operate under such a business model. Olathe was one of the first cities in the Kansas City metropolitan area to reach agreements with competitive telecommunications service providers. The city has long held a philosophy that competition is good for citizens as long as the right of way infrastructure is not compromised. We believe SB 397 reaches a reasonable balance between our duty to manage public right of way with the desire to encourage competition in telecommunications services. The city looks forward to enactment of SB 397 this session and using it as the basis for reaching new franchise agreements with both incumbent and competitive telecommunications providers in our community.

Thank you again for the opportunity to support SB 397.

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TESTIMONY BEFORE THE HOUSE UTILITIES COMMITTEE
PRESENTED BY ERIC R. ARNER
SENIOR ASSISTANT CITY ATTORNEY, LENEXA, KANSAS
MARCH 13, 2002

SENATE BILL No. 397

Chairperson Holmes, members of the House Utilities Committee, my name is Eric Arner and I am a Senior Assistant City Attorney for the City of Lenexa, Kansas. Among my duties, I am assigned to handle legal matters relating to telecommunications, right of way and franchising. Likewise, I was fortunate to have been appointed to the city negotiating team that met over the summer and fall with the telecommunications industry. Through this negotiating process, both sides made substantial concessions and compromises to reach the language contained in Senate Bill 397. I appear on behalf of the City of Lenexa to offer support for Senate Bill 397 and urge you to pass it with amendment.

The City of Lenexa has enjoyed a period of unprecedented growth in telecommunications. This growth in telecom was due in part to a number of converging components, namely a favorable economy, friendly financial market and probably most importantly, a Federal policy of promoting competition and enhanced technology in telecommunications. Congress passed the Telecommunications Act of 1996,

> "[T]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." (Public Law 104-104 amending 47 USC 151 et seq.)

As Congress promised with the passage of the Telecommunications Act of 1996, we are now seeing competition in telecommunications services. Likewise, as promised in the 1996 Telecommunications Act, we are seeing the deployment of new, high quality telecommunications technologies. The City of Lenexa has seen the benefits of the 1996 Telecom Act first hand. In the past few years, the City of Lenexa has granted over 12 telecommunications franchises to companies offering a variety of competitively priced services to our business and residential citizens. The City believes that access to these types of telecom services is vital to the continued success of our community.

Fundamental to the 1996 Telecom Act is the careful balance of enabling and regulatory authority between Federal, State and local authorities. Congress specifically recognized the traditional regulatory role of local government when in the Act, the control of the public right of way was left to local government. Specifically, 47 USC 253 reserves to the local authority the ability to manage the public rights of way and expect fair and reasonable compensation from the telecommunications providers for the use of those public ways. Congress though did not provide unfettered local control of the right of way, but instead conditioned the local control on fair, reasonable, nondiscriminatory and competitively neutral rules and regulations. 47 USC 253 (a)(b)(c)(d). Senate Bill

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397 recognizes the unique and important role envisioned in the Telecom Act of local government regulating their public rights of way in a fair, reasonable, nondiscriminatory and competitively neutral manner. Senate Bill 397 strikes a reasonable balance between the role of local government and the needs of the telecommunications industry. Senate Bill 397 also represents a compromise and as such must not be altered or amended or risk upsetting this careful balance between local government and the telecommunications industry.

From the local government perspective, SB 397 addresses three extremely important themes: managing the public right of way, preserving franchise fee revenues and finally preserving the traditional franchise relationship with telecommunications providers.

Right of Way Management

Over the past few years, cities all over the country have been struggling with managing their public right of way. The traditional regulatory model of one gas, electric, telephone, water and cable provider no longer works in the post-1996 Telecom Act era. Cities have been forced to deal with the increased demand for finite right of way space, all the while exercising their role as trustees of that public right of way. Congress recognized the change in the traditional right of way model when it specifically reserved the management of the right of way to local government but prohibited any unreasonable or unnecessary regulatory barriers. It is clear that local government has a fiduciary obligation to protect the public investment in the right of way. It is equally clear that local government must exercise this obligation, as it relates to telecommunications, in a competitively neutral and nondiscriminatory manner. This balanced Federal, State and local approach provides the appropriate vehicle necessary to deploy new telecom technologies without eliminating or reducing the ability of local government to effectively manage the right of way and protect the public investment in streets, sidewalks, landscaping and the like. SB 397 allows cities to effectively manage their public rights of way all the while complying with the letter and spirit of the 1996 Telecom Act and ultimately providing our citizens with enhanced telecommunications services without sacrificing their investment in the public way.

Fees

Cities have historically relied on the fees collected pursuant to the franchise statute, K.S.A. 12-2001. Franchise fees have traditionally been a stable and reliable source of revenue that most cities in Kansas have relied on for years as part of their operating budgets. Likewise, cities have also relied on other fees associated with the use of the public right of way by private enterprises. These right of way fees typically relate to the various aspects of right of way management such as administration, inspection and degradation. Although these fees are usually not substantial, they are important to a comprehensive right of way management program. After much negotiating on the fee issue, Senate Bill 397 provides a compromise that will allow cities to continue to collect

franchise fees on local exchange telephone service as well as permit cities to collect fair and reasonable fees as part of their right of way management responsibilities.

Franchise Relationship

Lastly, SB 397 preserves the status quo with respect to the relationship created by K.S.A. 12-2001 between cities and telecommunications providers. Throughout the negotiations, cities maintained that it was necessary to provide some mechanism that would continue the working relationships between telecom providers and the cities they serve through their franchise. Cities felt that this continued relationship was imperative to not only provide for a meaningful right of way management program but also provide a line of communication between cities and the telecom providers to resolve any ongoing issues. SB 397 preserves the traditional franchise relationship between cities and telecom providers by creating a contract franchise. Through this contract franchise, cities will have the ability to continue an open line of communication with telecom providers and thereby be able to resolve issues unique to their respective communities.

In conclusion, the City of Lenexa supports Senate Bill 397 and would further ask the House Utilities Committee to recognize the solid compromise represented by this bill and pass SB 397 without any changes or amendments. Thank you for allowing me the opportunity to present testimony on behalf of the City of Lenexa. Should you desire further information or clarification of any of my comments, please feel free to contact me at 913-477-7623 or earner@ci.lenexa.ks.us.

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Michelle B. O'Neal
Attorney

Southwestern Bell | SBC Internet Network

Before the House Committee on Utilities

SB 397 March 13, 2002

My name is Michelle O'Neal and I am an attorney for Southwestern Bell Telephone Company. I am writing in support of Senate Bill 397, which resulted from lengthy negotiations between representatives of municipalities and various telecommunications providers.

Beginning last summer, representatives from municipalities throughout the state and the telecommunications industry came together with one goal in mind; namely, to work towards a mutually agreeable bill that would govern the issuance of telecommunications franchises while preserving the municipalities' rights to manage the public right of way. Although the negotiation process was lengthy, it allowed both the telecommunications industry and the municipalities to work together on legislation that addressed the parties' concerns while preserving the current statutory framework governing franchises and use of the public rights of way.

The result, SB 397, required compromise from both the municipalities and the telecommunications industry. To that end, a delicate balance has been reached. I encourage the members of this committee and all legislators to examine the language and statutory framework contained in the bill. If you have any questions or concerns, please do not hesitate to ask the parties involved in the negotiations.

At the end of your deliberations, I believe you will find SB 397 to be in the public interest. Therefore, I respectfully request that you recommend the bill favorably for passage.

Thank you for your consideration.

Michelle O'Neal

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Sprint

Michael R. Murray
Director - Governmental
and Public Affairs

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March 13, 2002

TO: Members of the House Utilities Committee
FROM: Mike Murray
RE: SB 397

Throughout the summer and fall of 2001, Sprint representatives were active participants in negotiations between the telecommunications industry and numerous Kansas municipalities which resulted in Senate Bill 397. Debate was vigorous and thorough. Concessions were made both by the telecommunications industry and members of the League of Kansas Municipalities. SB 397 represents compromise, and if implemented as intended, fair public policy. Sprint supports Senate Bill 397.

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MEMORANDUM

TO: House Utilities Committee

FROM: Steven C. Montgomery, Legislative Counsel for MCIWorldcom

DATE: March 12, 2002

RE: Do Not Call Constitutional Issue

Question Presented

Whether the statutory reliance envisioned in the "industry do not call proposal" could survive constitutional challenge as an improper delegation of legislative authority in the context of designating the Direct Marketing Association ("DMA") do not call list as the list with which telemarketers must comply?

Brief Answer

The requirement that telemarketers refrain from placing consumer telephone calls to telephone numbers contained in the DMA do not call list does not constitute an improper delegation of legislative power under the circumstances presented. The function of the DMA in this instance is administrative only. The DMA is acquiring no additional powers. Rather, the do

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not call list it presently maintains is merely recognized by the state of Kansas to be the list with which telemarketers must comply, as opposed to a list created by some other entity. No cases have been reported in the do not call arena which might provide support to such an argument. Furthermore, it seems unlikely that the argument would be advanced, given the absence of litigation in cases alleging do not call violations.

Analysis

Summary of Unconstitutional Delegation of Powers

Article 2, § 1 of *The Constitution of the State of Kansas* provides: "The legislative power of this state shall be vested in a house of representatives and senate." A number of reported cases consider the argument that the legislature improperly delegated its powers, however only in an extreme minority of cases has the argument been favorably considered. The essence of the constitutional mandate is that the Kansas legislature may not delegate to a private entity its authority or governmental accountability. [*North American Safety Valve Industries, Inc. v. Wolgast*, 672 F. Supp. 488 (Kan. 1987)]

The DMA is not Acquiring Additional Power

The DMA presently maintains a national do not call list which it provides to the telemarketing industry. If the "industry proposal" is implemented, the DMA will not be performing any new functions. The function of maintaining a do not call list is administrative in nature and in an area in which the DMA has experience and expertise.

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The industry bill specifically prevents telemarketers from becoming DMA members or paying membership fees as a condition precedent to acquisition of the do not call list. Additionally, the Kansas Attorney General is afforded direct access to the list; both in acquiring it at no cost and in supplement the list of numbers which may not be called. These provisions of the bill retain sufficient government authority and accountability to avoid constitutional challenges such as discussed here.

No Case Law Has Been Reported in Support of Such Challenges

Three states currently have adopted the DMA list (Connecticut, Maine and Wyoming), although in slightly different formats which are irrelevant to this opinion. In none of these states have any reported cases been found in which the "unconstitutional delegation" argument has been advanced. Furthermore, the FCC (and the state of Arizona) presently requires telecommunication companies to maintain internal do not call lists and enforcement proceedings may be commenced for violations of the internal lists. No cases have arisen in which it has been alleged these schemes are improper. Consequently, there is no case law from other jurisdictions which might lend any support to such a challenge.

Litigation in Do Not Call Cases is Rare

As noted by Committee staff in its review of other states, the complaints of do not call violations are *overwhelmingly* resolved via settlement. Staff points out that in Florida: "To date, all complaints have been settled out of court. Since 1992, over $600,000 has been collected through 70 settlements." [Emphasis

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added] Florida is not an aberration. When violators of do not call laws are charged, they want to avoid the media and public scrutiny which could be a disaster for their business relations. Settlements and consent agreements are the norm. Accordingly, it seems quite unlikely that a scenario would arise in which the unconstitutional delegation argument would ever be considered by a judicial body.

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