

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Senator Karin Brownlee at 8:30 a.m. on January 23, 2002 in Room 123-S of the Capitol.

All members were present except:

Committee staff present: April Holman, Legislative Research Department
Sherman Parks, Revisor of Statues
Norman Furse, Revisor of Statues
Lea Gerard, Secretary

Conferees appearing before the committee: Rob Hodges, Kansas Telecommunications Industry Assoc.
Rachel Lipman Reiber, Vice President Regulator
& Govt. Affairs, Everest
John Federico representing Kansas Cable
& Television Assoc.

Others attending: See attached list.

Rob Hodges, President of the Kansas Telecommunications Industry Association, testified in support of **SB 397** (Attachment 1). Mr. Hodges stated **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.

The Committee questioned if it was new policy to pass on the franchise fees to customers. Mr. Hodges stated it would be new policy in the law but not new policy as pertains to the existing tariffs. The franchise fees that are being paid now are passed through to the customer in that locality.

Rachel Lipman Reiber, Vice President of Regulatory and Government Affairs for Everest Midwest, testified in support of **SB 397** (Attachment 2). Rachel Lipman stated the telecommunications industry deals with numerous municipalities throughout the state and **SB 397** brings uniformity to the franchising process and ensures that fees collected for right-of-way use are cost based.

John Federico representing the Kansas Cable Telecommunications Association presented an amendment to **SB 397** offered by the Kansas Cable Telecommunications Association (Attachment 3). Mr. Federico stated there are concerns regarding current franchise agreements that cable companies have with local municipalities to pay as part of their gross receipts for Internet service. Under the terms of this bill it appears the telecommunication industry that is offering the same service will be exempt from paying this. Mr. Federico requested a companion bill to run along side **SB 397** that would provide the cable industry with that same exemption. Other concerns Mr. Federico had was to change the word Communications to Telecommunications on Page 6 Line 32 and Page 7, Line 10 which clearly defines what requires a franchise and what does not. Another amendment offered was on Page 5, Line 41 to insert after the word received, "excluding there from the provision of cable TV service".

Mark Schreiber, Senior Manager, Government Affairs for Westar Energy submitted written testimony regarding **SB 397** (Attachment 4).

William P. Herdegen, Vice President Distribution Operations Kansas City Power & Light, submitted written testimony regarding **SB 397** (Attachment 5).

There being no further conferees to appear before the Committee, Chairperson Brownlee closed the public hearing on **SB 397**.

Committee questions and discussion followed regarding definitions in the bill, franchise agreements and the Federal Telecommunications Act.

CONTINUATION SHEET

MINUTES OF THE

The Chairperson asked Don Moler, Executive Director, League of Kansas Municipalities for his views regarding the changes offered to **SB 397**. Mr. Moler stated the definitions that are in the bill came directly from the Federal Telecommunications Act. The cities and the telecommunications industry specifically used the Telecommunications Act so there would be no conflicts and would not conflict with federal law in anyway. Part of the complexity is the fact there are different Federal acts controlling the telecommunications industry and the cable industry; they chose the one dealing with telecommunications.

Rob Hodges, President of the Kansas Telecommunications Industry Association, stated the definitions in **SB 397** were not subject to negotiation in so far as the wording of those definitions. The cities and the telecommunications industry decided to adopt existing definitions from the Federal Act as the best way to have something everyone could depend on for both sides. He also stated along with Kim Gulley that it was not the intent of the bill to impact the cable industry with **SB 397**.

The municipalities, the telecommunications industry and the cable industry were instructed by Chairperson Brownlee to work out their differences during the day so the Committee can work the bill tomorrow.

Senator Emler moved, seconded by Senator Jordan, that the Minutes of January 16, 2002 be approved. The vote was unanimous in favor of the motion.

Meeting adjourned at 9:30 a.m.

The next meeting is scheduled for January 24, 2002.

**SENATE COMMERCE COMMITTEE
GUEST LIST**

DATE: January 23, 2002

NAME	REPRESENTING
Nelson Krueger	Everest Connections
Jody Bozeling	Wyandotte County/KC, KS
George Sooter	Wyandotte Co KCKS
Eric Amer	City of Lenexa
Pat Lehman	City of Lenexa
Ron Applehoff	Water District No 1 of Jo Co
Whitney Damron	KS Gas Service
Mark Schreiber	Westar Energy
Galen Biery	KS Gas Service
Steve Johnson	Kansas Gas Service
Rachel Reiber	Everest Connections
Stuart Little	Westar Energy
Lisa Wetzler	City of Leawood
Stephanie Buchanan	DOB
Natalie Brigid	REAP
DENNY KOCH	SW Bell
Bill Sneed	SW Bell
Bob Jayroe	Connect Kansas
Ed Sims	SWBT
MICHELLE O'NEAL	SWBT
Tim Pickering	SWBT
Jim Graftner	LI 11

Don Seifert	City of Olathe
Cathy McNorton	KTLA
MIKE TAYLOR	City of Wichita
MIKE SANTOS	CITY OF OP

CHRIS CARROLL

Drew Fleming
Mike Reecht

Maughan Clift

Ashley Sherard

TOM DAY

Terry Leatherman

Kim Gullett

Don Molen

SBC - SOUTHWESTERN BELL

Everest Connections
ATT

Citizen & Large

Johnson County

KCC

KCCI

LKOR

LKM



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 Senate Committee on Commerce

SB 397

January 22, 2002

Good morning, Chairman Brownlee 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 and that resulted in the drafting of SB 397.

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 local telecommunications service. Section 2, beginning on page 10 in line 30, would amend K.S.A. 17-1902 and is the "right-of-way" portion of the bill. Section 2 pertains to all 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 5, line 42], and municipalities could impose a per-access-line fee [page 7, line 12], a gross receipts fee [page 7, line 40], or no fee at all. Any fee imposed would be required to be passed through to local customers in that municipality [page 10, line 24]. Fees and contract franchise requirements would have to be competitively

Senate Commerce Committee

Jan. 23, 2002

Attachment 1-1

neutral [page 6, line 6; page 7, line 36; page 8, line 21], and restrictions would be placed on what a municipality could require in its contract franchise ordinance [page 6, line 13 and page 9, line 26].

In the right-of-way portion of the law [Section 2 of the bill beginning on page 10, line 30], the provisions of the bill would apply to all “providers” that occupy a public right-of-way [page 10, line 42]. 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 27]. Likewise, administration of a municipality’s public right-of-way would be required to be competitively neutral [page 11, line 27].

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.

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

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 turned up its first customers on January 25, 2001, in Lenexa, Kansas. At this time last year, the city of Lenexa had welcomed us with open arms. 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.

In 1992 Congress passed the Cable Act and in 1996 it passed the Telecommunications Act. Both 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.

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

Senate Commerce Committee
Jan. 23, 2002
Attachment 2-1

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."



**Testimony Offered On Behalf of the
Kansas Cable Telecommunications Association**

Senate Commerce Committee

January 22, 2002

SB 397

**Offered by
John J. Federico
Federico Consulting**

My Name is John Federico and I appear before the Senate Commerce Committee today on behalf of the Kansas Cable Telecommunications Association (KCTA). The KCTA is hopeful the Committee will adopt the attached amendment to SB 397 in the spirit of fairness.

The amendment offered by the KCTA does nothing more than codify the requirement that if a telecommunication company offers cable television services, that it obtain a franchise agreement with the local municipality, in the same manner that an existing cable operator must.

The KCTA's overall position on SB 397 is one of "neutrality." We appreciate the hard work and patience that went into this piece of legislation and the difficult path it has yet to travel.

Thank you for your consideration of our concerns and I will be happy to respond to any questions that you might have.

A handwritten signature in black ink, appearing to read "John J. Federico".

John J. Federico, J.D.
Federico Consulting
On Behalf of the KCTA

SENATE BILL No. 397

By Joint Committee on Economic Development

1-17

9 AN ACT concerning telecommunications providers; relating to the use
10 of public rights-of-way; amending K.S.A. 12-2001 and 17-1902 and
11 repealing the existing sections.

12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. K.S.A. 12-2001 is hereby amended to read as follows: 12-
14 2001. (a) The governing body of any city may permit any person, firm or
15 corporation to:

16 (1) Manufacture, sell and furnish artificial or natural gas light and
17 heat; electric light, water, power or heat; or steam heat to the inhabitants;

18 (2) build street railways, to be operated over and along or under the
19 streets and public grounds of such city;

20 ~~(3) construct and operate telegraph and telephone lines;~~

21 ~~(4)~~ (3) lay pipes, conduits, cables and all appliances necessary for the
22 construction, operation of gas and electric-light or steam-heat plants;

23 ~~(5)~~ (4) lay pipes, conduits, cables and all appliances necessary for the
24 construction and operation of electric railways or bus companies;

25 ~~(6)~~ (5) lay pipes for the operation of a water plant for the distribution
26 or furnishing of water over, under and along the streets and alleys of such
27 city; or

28 ~~(7)~~ (6) use the streets in the carrying on of any business which is not
29 prohibited by law.

30 (b) If the governing body of a city permits any activity specified in
31 subsection (a), the granting of permission to engage in the activity shall
32 be subject to the following:

33 (1) All contracts granting or giving any such original franchise, right
34 or privilege, or extending or renewing or amending any existing grant,
35 right, privilege or franchise, to engage in such an activity shall be made
36 by ordinance, and not otherwise.

37 (2) No contract, grant, right, privilege or franchise to engage in such
38 an activity, now existing or hereafter granted, shall be extended for any
39 longer period of time than 20 years from the date of such grant or
40 extension.

41 (3) No person, firm or corporation shall be granted any exclusive
42 franchise, right or privilege whatever.

(7) furnish cable television services to the inhabitants of a city;
provided, however, providers of cable television services shall
fully comply with and be governed by the provisions of KSA
12-2006 through 2014, and amendments thereto.

3-2

1 arising out of the provider's activities in a public right-of-way.

2 ~~(s) Nothing contained in K.S.A. 17-1902, and amendments thereto, is~~
3 ~~intended to affect the validity of any franchise fees collected pursuant to~~
4 ~~state law or a city's home rule authority.~~

5 (t) Any ordinance enacted prior to the effective date of this act gov-
6 erning the use and occupancy of the public right-of-way by a provider
7 shall not conflict with the provisions of this act.

8 New Sec. 3. If any provision of this act, or the application of such
9 provision to any person or circumstance is held invalid or unconstitutional,
10 it shall be conclusively presumed that the legislature would not have en-
11 acted the remainder of this act without such invalid or unconstitutional
12 provisions.

13 Sec. 4. K.S.A. 12-2001 and 17-1902 are hereby repealed.

14 Sec. 5. This act shall take effect and be in force from and after its
15 publication in the statute book.

(s) Providers intending to provide local exchange service in a city shall comply with the provisions of KSA 12-2001(d), and amendments thereto; providers intending to provide cable television service in a city shall comply with and be governed by the provisions of KSA 12-2006 et seq., and amendments thereto; and further that nothing contained in KSA 17-1902, and amendments thereto, is intended to affect the validity of any franchise fees collected pursuant to state law or a city's home rule authority.

33



Testimony before the Senate Commerce Committee by Mark Schreiber, Senior Manager, Government Affairs for Westar Energy, on January 23, 2002.

Westar Energy is neutral on SB 397.

We understand and respect the desire to keep this legislation specific to the parties who negotiated these terms — the municipalities and telecommunications companies. But we also believe it is important that you understand our thoughts and concerns about this issue because our company has similar issues and problems. Much like the situation facing the telecommunications companies last year, Westar Energy has seen an increase in right of way requirements and new expanding requirements associated with franchise agreements. Some cities, while agreeing to a moratorium on implementation of new franchise and right of way ordinances for telecommunications providers, have continued to move forward on similar ordinances that apply to providers of natural gas services and electric energy. We are currently engaged in franchise negotiations in a number of communities and expect to have a number of other franchise agreements up for renewal consideration soon. As a result, we have a keen interest in this issue.

We want to highlight a number of provisions that we believe should be applicable to all who use the public right of way or are subject to the state franchise laws and point out at least one technical problem with this legislation as drafted.

On the technical side, a definition of “gross receipts,” which starts on Page 4, Line 42, defines the term in a way to apply only to the telecommunications industry. That is problematic because current law uses the same term (Page 2, Line 21) in authorizing assessment of a franchise fee on other utilities. While easily resolved, this illustrates our interest and concerns about this legislative approach.

Several key elements of this legislation should apply to all companies that hold franchises or operate in the right of way. On franchise issues, SB 397 would:

- Cap the franchise fee at 5 percent for telecommunications companies. Placing a cap on the franchise fee on one particular industry while leaving it open to increases above the cap on other companies will lead to an inequitable distribution of the costs associated with doing business in a community. Page 7, Lines 40-43.
- Clearly defines the role of a franchise agreement to assure that jurisdiction does not overlap or conflict with the responsibilities of the KCC. Page 6, Lines 30-33. Page 9, Lines 26-43.
- Clarifies the authority to recover the franchise fee assessments from telecommunications company customers through a line item on each bill. Page 10, Lines 24-29.

The right of way portion of SB 397 also contains language that should be applied to all occupants of the right of way.

- Page 12, Lines 16-27 limits use of right of way powers to regulate other business activities of a telecommunications provider.
- Page 13, Lines 27-43, continuing to Page 14, Lines 1-17, defines and limits fees that may be assessed for right of way access.

It is not our intent to complicate your consideration of this legislation. We believe that there is an opportunity to resolve a similar problem in a similar industry using language that has already been accepted through the negotiating process as has occurred in this case. The provisions outlined in this testimony could be packaged in a companion bill without upsetting the carefully crafted compromise between the telecommunications industry and the municipalities in the state. It is early enough in the session to move such an effort forward this year allowing us to proceed with our ongoing franchise negotiations.



Testimony
Before the Senate Commerce Committee
Public Rights-of-Way
Senate Bill No. 397

January 22, 2002

William P. Herdegen III
Vice President Distribution Operations
Kansas City Power & Light

At Kansas City Power & Light, we appreciate the opportunity to submit this testimony on S. 397 in regard to franchise fees and use of the rights-of-way.

We respect the process of the cities and telecommunications companies to address their specific issues. We believe the bill does a good job of establishing appropriate parameters for the use of rights-of-way for telecommunications companies. We request that all utilities have these same rights and responsibilities.

The first part of S. 397 would amend state statute on franchise fees, and some of the changes, such as the improved approval processes, would streamline our franchise fee negotiations. We support these changes.

We are concerned about the rising level of franchise fees. Electric utilities already pay significant franchise fees to conduct business in a city. Franchise fees set above the costs to the cities are increased taxes, and these tax increases must be passed along to the customers.

Some cities view their rights-of-way as a revenue-producing asset. To set permit fees above actual costs simply uses the utilities as a tax collector.

This summer we became aware of new fees and proposed fees. Some of the new fees included are in the areas of inspection, degradation, and lane closure. Several dozen construction projects may occur in a community each

year. We now are learning that projects that once used to incur \$25 in fees could now incur fees up to \$400 for each project.

The first section of S. 397 seeks to amend a statute that addresses franchise fees for all utilities. However, the bill would impose an extensive set of definitions that only apply to the telecommunications companies. What those terms mean in regard to other utilities is uncertain. We would have to insist on equal treatment in regard to the scope of franchise fees and the ability to recover these costs. For example, proposed KSA 12-2001 (r) allows telecommunications companies to pass along fees assessed by a city directly to the end user's customer bill, statement or invoice. Other utilities need that same clarity.

The second section of S. 397 is on rights-of-way. It seeks to amend the telecommunications law, and proposed KSA 17-1902(n) and (o) prohibit setting permit fees above actual costs. These provisions should be provided to all utilities. To avoid equal protection problems, the cities will have to treat all utilities the same in regard to franchise fees and rights-of-way permit fees.

The franchise fee statute, 12-2001, should be amended to address all utilities. The new section 17-1902 on rights-of-way should be duplicated in the utility statutes, K.S.A Chapter 66.

We are evaluating our options and talking to the cities about what assurances they can give us. We may also ask the legislature to adopt a bill package that clarifies the rights and responsibilities regarding these transactions for all utilities.

Thank you for allowing us to submit testimony. If there are any questions, feel free to contact Cynthia Smith, our manager of government affairs for Kansas or me.