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TESTIMONY BEFORE  
SENATE COMMITTEE ON UTILITIES

REGARDING SENATE BILL 401  
RELATED TO PLACEMENT OF WIRELESS COMMUNICATION EQUIPMENT ON  
PUBLIC RIGHT OF WAY AND PUBLIC LANDS

February 8, 2016

Mr. Chairman and Committee Members:

Good afternoon, I am Joel Skelley, Director of Policy for the Kansas Department of Transportation ("KDOT"), and am here today to testify with regard to SB 401. This bill proposes to give companies providing wireless communication services an unqualified right to place cell structures, antennae, and related equipment virtually anywhere they choose on public right of way, and to apply to co-locate wireless structures on existing KDOT communication towers.

We note the term "public right of way" is not defined in the bill, but for KDOT's purposes we are assuming it includes all property owned, utilized or purchased for state highway purposes under K.S.A. 68-413, and 68-423a.

Two other statutes are relevant to the Secretary of Transportation's authority to govern uses of right of way. First, K.S.A. 68-413b states "All rights of way of the state highways *shall be used exclusively for public highway purposes.*" That mandate is qualified by the discretion given to the Secretary to authorize uses that will not interfere with public travel and state and federal regulations relating to highways. Second, K.S.A. 68-415 recognizes that utilities, including "telecommunication facilities" may be constructed or located along state highways "upon that part of the right of way of the state highway *designated by the secretary of transportation.*"

Since 1959, KDOT had in place a "Utility Accommodation Policy" ("UAP"), which allows KDOT to accommodate the installation of utility facilities on highway right of way, while also maintaining KDOT's responsibility to preserve the operational safety, integrity and function of the state highway system. The UAP has been regularly updated to address the changing needs of utilities.<sup>1</sup> The UAP contains comprehensive criteria for evaluating and granting permits for various types of utilities within designated utility corridors and elsewhere on right of way. Types of utility facilities on highway right of way vary great and have to be evaluated individually based on factors applicable to the type of

<sup>1</sup> The current KDOT UAP, adopted in 2007, is available at <http://www.ksdot.org/Assets/wwwksdotorg/bureaus/burConsMain/Connections/UA>

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facility and location or placement requested. Utility facilities include above-ground installations, underground installations, attachments to bridges or other structures, installations near retaining wall systems, installations parallel to a highway or those crossing under or over a highway structure. The policies and criteria established in the UAP provide for fair and uniform treatment of all types of utility installations on Kansas highway right of way. More importantly, the UAP allows a process for KDOT to adhere to established engineering standards to protect the integrity of state highway infrastructure and to provide for a safe highway facility for travelers.

Admittedly, the current UAP does not allow the installation of large commercial communication towers on highway right of way. This is due largely to the substantial amount of land required to support such an installation including fall zone requirements. Most highways have limited right of way; installation of communication towers on right of way in close proximity to a highway runs counter to the agency's legal responsibility to protect the safety of the traveling public. However, as an indication of KDOT's consideration of and response to the changing needs of telecommunications providers, KDOT amended the UAP in 2014 to allow installations of small cell antennae for distributed antenna systems. The height of these structures has been limited to 45 feet for safety purposes.

The permitting procedure under the UAP has successfully balanced the needs of utilities with the agency's responsibilities for over a half-century. Moreover, these procedures provide protections to the state by issuance of a permit specifying the terms and conditions of the use of the right of way, including such matters as: (1) traffic control during construction or maintenance activities, (2) liability for any damages resulting from the installation, (3) documentation of liability insurance, (4) notification to the agency when beginning work and completion, (5) timeframes for installation work, (6) costs for relocation or removal of the utility if required by the agency's future need for the right of way, (7) the protection of other utilities, and (8) clauses specifying conditions under which the Secretary may terminate the permit, including violations of permit requirements by the utility.

SB 401 negates the statutory authority of the Secretary to determine where and under what conditions utility structures are to be placed on highway right of way. Further, the bill renders the current and future needs of the state highway system, as determined by the Secretary, subordinate to the interests of wireless communication providers. Specifically, section (d) of the bill states wireless providers have the "right to construct, maintain, and operate wireless support structures, small cell wireless facilities or distributed antenna systems along, across, upon or under the public right of way." This right is unqualified. There is no requirement for the wireless provider to apply to the Secretary for authority for placement of any of the named structures on the right of way. The right given wireless providers in Subsection (d)(2) is qualified only by the public authority's ability to require the utility to repair damage caused by installation of the facility. The factors specified in section (f) limiting the scope of a public agency's consideration of an "application" for construction of a wireless support structure or other uses of public facilities appear to not apply to placement of structures on right of way under section (d). Finally, giving wireless providers the right to use right of way without obtaining a permit under the UAP deprives the state of the protections afforded by a permit, and required by all other utilities using highway right of way.

#### Conflicts with Federal Regulations

As indicated in a separate fiscal note provided February 5, 2016, to the Director of the Budget, SB 401 does not allow wireless services providers to be charged any rental, license or other fees for location a wireless facility or wireless support structure on state highway right of way.<sup>2</sup> Regulations issued by the Federal Highway Administration (FHWA) require that the state receive market value for use of right of way acquired by federal funds.<sup>3</sup> This provision of the bill would not allow the agency to comply with this requirement, thus jeopardizing the state's ability to receive future federal funding for state highway projects.

In addition, FHWA must approve all non-highway use and occupancy on interstates.<sup>4</sup> FHWA must also approve any use agreements for real property on interstates.<sup>5</sup> KDOT has authority to approve non-highway uses and agreements and use agreements only for non-interstate highways in the state. A wireless provider's decision to locate wireless structures or facilities on interstate right of way under section (d) of the bill would be in conflict with FHWA's authority to regulate occupancy and use of right of way for interstates highways.

#### Concerns Regarding KDOT 800 MHz Communication System.

KDOT operates and maintains a statewide 800 MHz communication system ("System") with approximately 80 large communication towers and related facilities across the state, with 120 additional small towers for system connectivity purposes located at KDOT area and subarea offices. Most, but not all, of the towers, tower sites, and related facilities are owned by KDOT. Under legislation passed in 2004,<sup>6</sup> the System, used at that time by only KDOT and the Kansas Highway Patrol, was opened for use by other state and local governmental entities and public safety agencies. "Public safety agency" is specifically defined as any governmental agency providing law enforcement, emergency management, firefighting, ambulance, emergency medical or other emergency services.<sup>7</sup> Under the 2004 legislation, KDOT is authorized to "lease" access to the System to nongovernmental entities only "to the extent such access is not required by the department or public safety agencies." Prices for leasing access to nongovernmental entities "shall be at prevailing rates so as to minimize competition with private business."<sup>8</sup>

Under SB 401, a wireless provider may apply to collocate wireless facilities on existing structures or "substantially modify" an existing structure. "Existing structures" presumably include towers within KDOT's System. It also appears towers in the System may be deemed to be on "public lands," subject to the application provisions of subsections (e) and (f) of the bill. "Public Lands" is not defined, except that it excludes "public rights of way" governed by subsection (d) of the bill.<sup>9</sup> Subsection (e) states an authority "may" enter into a lease of public lands and facilities; however subsection (f) includes a

<sup>2</sup> SB 401, Section 1 (d)(1).

<sup>3</sup> 23 CFR 710.403 and 23 CFR 710.409.

<sup>4</sup> 23 CFR 1.23(c).

<sup>5</sup> 23 CFR 710.405.

<sup>6</sup> 2004 H.B. 2756.

<sup>7</sup> K.S.A. 75-5073 (e).

<sup>8</sup> K.S.A. 75-5074.

<sup>9</sup> SB 401, Section 1 (e)(3).

number of factors that cannot be considered in connection with an application. Those factors significantly limit an authority's ability to not agree to a wireless provider's application for leasing its facilities.<sup>10</sup> Further, the bill mandates that leases cannot be for less than 20 years and puts in place strict time frames for consideration of applications, which if not met by an agency, deem the applications approved.<sup>11</sup>

KDOT has many concerns about the framework established in the bill for consideration of applications in connection with use or leasing of the 800 MHz system. First, the 20-year mandatory lease term compromises the need to preserve capacity of the system which may be needed in the future for public safety purposes. Second, applications for collocation of wireless equipment or substantial modification of existing towers require completion of structural and interference analysis for each tower, which requires engineering services outside of KDOT. Although it is possible for an application for substantial modification to an existing tower site to be processed within 90 days calendar days, multiple site applications filed within a short time frame could not be completed within 90 days due to amount of time necessary for each analysis, as well as limited agency resources. Such applications would be deemed approved by default, regardless of the completion or results of the necessary analysis.

KDOT is supportive of the declared purposes of SB 401. However, many of the provisions of the bill, as they relate to state highway right of way and the 800 MHz System, seem unnecessary in light of existing KDOT procedures and policies. In addition, the bill makes the interests of KDOT and the state highway system subordinate to the interests of wireless providers and other utilities, in direct conflict with existing and long-standing statutory authority of the Secretary of Transportation. Further, K.S.A. 17-1902, which pertains to the rights of telecommunications service providers for occupancy of right of way of cities, makes clear that a provider's right to use and occupy the public right of way "shall always be subject and subordinate to the public health, safety and welfare requirements and regulations of the city." The same protections should be provided in SB 401 for KDOT's administration and oversight of state highway right of way and the state communications system. Finally, KDOT needs to be able to deny applications or uses of right of way that are in violation of terms under which federal funding was obtained for certain highway projects and not jeopardize the ability to receive future federal highway funds.

KDOT has concerns with other aspects of the bill, which need not be detailed here. KDOT cannot support the bill as written, but would like to cooperate with the bill's proponents on revisions that would enable KDOT to support the bill.

Thank you for the opportunity to address KDOT's concerns with you today. I will be happy to answer any questions the committee has at this time.

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<sup>10</sup> Of specific concern are (f)(3) which prohibits the public authority to consider the availability of other potential locations for placement of wireless support structures, including alternate options for co-locating, and (f)(9) which prohibits the authority to create a preference based on ownership by the authority of any property, structure or tower when adopting rules or procedures for siting wireless facilities.

<sup>11</sup> SB 401, Section 1 (g)(1) requires a determination on an application for within 150 calendar days a new wireless support structure and within 90 days for application for a substantial modification to an existing wireless support structure or any other application for placement of equipment.