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Senate Utilities Committee Hearing on SB 401
Testimony in Opposition to SB 401 by the City of Overland Park
February 8, 2016

Honorable Chairman Olson and members of the Senate Utilities Committee:

The City of Overland Park opposes SB 401 as it is currently written. The spirit of this bill is admirable and addresses good public policy. However, many of the policies advanced by the legislation may endanger the safety of our citizens, overwhelm municipal infrastructure, and damage the beauty of our communities.

Proposed SB 401 significantly expands upon the regulations adopted by the FCC in its *2014 Wireless Siting Order*.[1] These regulations adopted by the FCC were part of a massive rulemaking involving the key stakeholders from industry and state and local government and was an attempt to adopt a set of broadly applicable, uniform rules and regulations that balanced the competing needs of all sides. The wireless industry should not now deviate from the federal framework that it worked on absent specific and empirical information that demonstrates that those rules and processes are not working in our Kansas communities.

Definitions
The proposed definitions overlap, expand and differ from the federal definitions adopted by the above-referenced FCC Order, codified at 47 C.F.R. § 1.40001 and elsewhere in the FCC's rules. The use of contrary definitions opens the door to confusion, misinterpretation and legal conflict between state and federal law. Accordingly, the federal definitions should be utilized unless wireless carriers can explain the need for more expansive definitions.

Limiting Application Fees
Subsection (c)(1) states that no application fee shall be charged for constructing, substantially modifying, or collocating on wireless towers that is not required for similar types of commercial development. This language ignores the substantial differences in reviews for different types of commercial developments. The safety, zoning, traffic impact, and infrastructure considerations for a new restaurant vary greatly from the considerations for a wireless tower. At a minimum, the mandate should be limited to the treatment of similar wireless facilities.

[1] *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-328, Report and Order, (Oct. 21, 2014)("*FCC Order*")

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Subsection (c)(2) limits application fees to the actual costs to the municipality for processing those applications. Overland Park already ties application fees to the actual costs of staff time pursuant to K.S.A. 17-1902. However, Section 1(c)(4) then caps those fees at the lesser of the fees for a building permit for ***any other type of commercial or land use development*** or a designated dollar amount. The mandate that application fees be tied to costs should make the need for caps unnecessary; and we are especially troubled that the fee could be limited to the fee for a building permit for any other type of commercial or land use development. Again, requiring equal treatment of wireless providers and other commercial developments ignores the differences in the time and considerations associated with the reviews for each type of development. For these reasons, we strongly suggest that Subsection (c)(4)(A) be stricken from the bill, and that the necessity of Subsections (c)(4)(A)-(B) be reviewed.

Limiting Right-of-way Fees

Subsection (d)(1), requiring that municipalities not assess fees on wireless providers for the use of the rights-of-way unless such fees are also assessed on other users including municipally-owned utilities, is problematic and overly broad. It makes no sense for a municipality (and its taxpayers) who have spent money to acquire and maintain rights-of-way for community purposes (including municipal utilities such as water and sewer systems) to pay money for the use of that same public rights-of-way, let alone on a par with what private, for-profit companies pay. For example, under this provision, Overland Park could no longer collect fees from providers using its rights-of-way unless it ***charges itself*** for using the right-of-way for its stormwater system. At a minimum, the section should be limited to municipalities that use the rights-of-way to offer competitive communications services.

We also believe Subsection (d)(1)'s requirement that any fees charged to wireless providers for use of the public rights-of-way be non-discriminatory and competitively neutral with fees assessed on other users of the rights-of-way **including municipal utilities** may conflict with the Kansas Franchise Act. (K.S.A. 12-2001 *et seq.*). This Subsection also appears to be unnecessary since K.S.A. 17-1902(d) already prohibits unreasonable and discriminatory treatment of providers using city right-of-way.

Limiting Right-of-way Regulation

A major problem with SB 401 is that its right-of-way provisions conflict with K.S.A. 17-1902, which has outlined the regulation of public rights-of-way since 1868.[2] Subsection (d)(2)(A) gives wireless providers authority to build structures along, across, upon, and under public right-of-way, limited ***only if*** that construction obstructs usual travel, public safety, or the legal use of the right-of-way by other utilities. Similar language and rights for wireless providers is already in K.S.A. 17-1902(b), but unlike that statute, it is not followed by language expressly stating that the right to build in a public right-of-way is subject to the reasonable public health, safety and welfare requirements and regulations of cities. In fact, this section provides no mechanism or authority to enforce its stated limitations. This means, for example, that providers could install dozens of monopoles, a full-sized tower, or large utility boxes within a median or along the sidewalk of any neighborhood in Kansas, and the City and its citizens would have no

[2] Revised in 2002 and 2006 for telecommunications franchisees and video service providers.

way of preventing it or to address public safety concerns. Wireless structures could be added on the City's traffic lights (which Overland Park prohibits) creating public safety issues and damaging the integrity and safety of the traffic light systems.[3] Additionally, if a city cannot control how the utilities coexist within its rights-of-way, the potential for accidental ruptures to gas lines, waterlines, and other utility damage increases exponentially. Limiting cities' oversight of their rights-of-way is a substantial deviation from current law, obstructs needed public works projects, increases risks to public safety, and can cause dramatic changes to the character of our neighborhoods. For these reasons Subsection (d)(2)(A) should be removed from the bill or made subject to the historic protections provided by K.S.A. 17-1902.

Subsection (d)(2)(B) impacts protections within K.S.A. 17-1902(k), which allow cities to sue a provider for the damages they have caused to the right-of-way. The new Subsection instead gives providers ***unilateral authority*** to decide if the alleged costs are satisfactory. This is an unjust remedy for potential damages caused by wireless providers, and this Subsection should be removed.

Planning and Zoning

Subject to certain limitations,[4] the Federal Telecom Act and supplement federal law and regulations specifically preserves the rights of local government over zoning and land use decisions for personal wireless service facilities and these rights have been repeatedly reviewed and protected by the courts. Through death by a thousand cuts, SB 401 effectively guts and eliminates all zoning and land use regulations and encroaches on legitimate police power authority of localities.

Subsection (d)(2)(C) should be clarified that cities retain zoning authority over utility easements and private property, as well as enforcement authority with respect to building codes.

(First) Subsection (f) – Most of these provisions are problematic and impede on the balance between the public interest and police power requirements that local governments have in managing and maintaining the health and safety of their community and the legitimate needs of industry in having a timely, reasonable and consistent process for constructing or modifying wireless facilities.

(First) Subsection (f) (1)-(3) – These subsections are intended to restrict cities' ability to verify that the wireless service is necessary, is necessary at the height proposed and that more palatable alternatives are unavailable. Federal law prohibits cities from prohibiting or effectively prohibiting personal wireless service, but otherwise preserves cities zoning rights. Through the years, this issue has been well litigated and addressed by the courts and the FCC, setting a delicate balance between the provision of wireless services (both coverage and capacity) and cities' protection of negative impacts on adjoining property owners. The proposed subsections

[3] Overland Park allows installation on street lights and has multiple agreements with wireless providers.

[4] A local government: may not unreasonably discriminate among providers of functionally equivalent services; may not regulate in a manner that prohibits or effectively prohibits the provision of personal wireless services; must act on applications within a reasonable period of time; must make any denial in writing supported by substantial evidence; and cannot deny on the basis of environmental effects of radio frequency (RF) emissions in compliance with the FCC's RF rules. See also above referenced *2014 Wireless Siting Order.*

threaten to tip over the cart and eliminate this delicate balance. The end result is that cities will be unable protect adjoining residents, businesses and other property owners from any unnecessary detrimental impacts.

(First) Subsection (f)(4) – Cities should be able to discuss and review infrastructure and technology options and to then reasonably regulate. Again this is an issue already addressed by the FCC and courts in a manner to prevent cities from unreasonable regulations. As written, this provision prevents cities from requiring monopoles with internal antennae and allows providers to return to lattice towers with large antennae arrays. We recognize the providers' concern that certain facilities are not always technologically feasible; but this provision attacks with a sledge hammer what should be done with a scalpel. The City would be pleased to have time and the opportunity to work with providers to find an alternative solution.

(First) Subsection (f) (6) – The FAA regulations were not intended for this type of purpose, and furthermore, the FAA does not have a uniform standard but its regulations vary from location to location based on factors such as location of airports, etc. The real intent of this subsection is to eliminate cities ability to impose maximum heights under its reserved zoning authority.

(First) Subsection (f) (9) – Overland Park does not discriminate on the basis of ownership regarding rules for siting wireless facilities or for evaluating applications. However, this is another section that should be amended so that wireless providers are not treated the same as cities using their own property. The definition of wireless facilities is so broad that it could include devices and facilities that the City uses for public safety communications. Cities should not be required to treat wireless providers the same as public entities carrying out their public safety missions.

(First) Subsection (f) (10) – Cities should be able to address the presentation, screening and appearance of wireless facilities as long as it does not impede the providers' ability to provide service; and this is a right specifically reserved for cities in the federal Telecom Act. Cities have similar presentation, screening, landscaping and appearance requirements for other commercial and residential structures as well as for all other types of utilities. Providers have given no reason why they should be treated differently or why these requirements detrimentally impact their ability to provide services. (It is important to note the broad definitions of this bill also encompasses providers' equipment buildings, cabinets, storage sheds or similar structures.)

(First) Subsection (f) (15) – Federal regulations already require providers to have emergency power systems and prevent cities from prohibiting them. However, these rules give cities the ability to address how implemented for example, the FCC's Wireless Siting Order states:

> [W]e clarify that Section 6409(a) does not preclude States and localities from continuing to require compliance with generally applicable health and safety requirements on the placement and operation of backup power sources, including noise control ordinances if any.[5]

[5] *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies,* WT Docket No. 13-328, Report and Order, (Oct. 21, 2014), at para. 202.

The language should be revised to reflect the federal rules and preserve reasonable health and safety requirements, including noise control and fuel source safety.

(First) Subsection (f) (16) – Collocation has been well litigated and addressed through the years and the law has settled in a manner that balances the need to provide service and the limitation of unnecessary towers and other facilities. The issue often stems from one provider refusing another provider access to a particular location or structure in order to gain a competitive advantage. Collocation requirements therefore actually encourage the fair provision of wireless services as set forth in Section 1(a) of the bill, while also allowing cities a tool to mitigate and prevent the propagation of unnecessary towers.

(First) Subsection (f) (17) – Cities do impose setback or fall-zone that differ from other types of commercial structures but there is a key difference - height restrictions for these other types of commercial structures are dramatically lower than tower height restrictions. Furthermore, commercial districts with the tallest buildings are typically located well away from residential, agricultural and similar properties whereas towers can be located in any district. Finally, the fall-zone requirements are matters of public safety and should not be eliminated.

(First) Subsection (f) (19) – This provision would allow towers indefinite zoning approval and eliminate cities ability to periodically verify the need for or use of the tower facility. Unlimited use permits is poor planning policy and should be avoided. Perhaps a compromise provision would be to prohibit approval durations of less than ten (10) years.

Subsection (i) – The City is opposed to the language on page 9, lines 30-35 eliminating the authority and jurisdiction of cities over the construction, installation or operation of any small cell facility or DAS system in an interior structure or located on privately-owned property or property not otherwise owned or controlled by the authority. This provision completely eliminates city authority - both zoning and building code requirements - over small cell and DAS systems on private property. Again it should be noted this language goes beyond the small cell antennae and also applies to accessory equipment, fiber lines, storage sheds and utility cabinets First, there is no need for this language - the City has been very open to small cell facilities and has worked hand in glove with these providers. Second, the unintended consequences of the particular language detrimentally encroaches upon legitimate police power authority of localities and creates a discriminatory practice between these providers and other similarly situated utilities as well as other property owners. DAS and small cell providers have already been adequately protected by other provisions in the bill and this language should be eliminated.

Lease of Public Lands

Subsection (e) provides that a city may lease public lands, buildings and facilities to an applicant, but then places unnecessary restrictions on cities. Cities should have the ability to negotiate the length of any term of a property/facility lease like any other property owner and should not be locked into 20 year terms. The option that cities lease public property or facilities without a fee, while not a mandate, creates a suggestion that it is in the public interest to do so and may create arguments/expectation that cities do so. It is not even clear that such a provision is even legal under the Kansas Constitution, which prohibits the giving away of the use of money or property to private use without compensation.

The restriction on fees (rent) for the use of city property/facilities is equally problematic. While it is not objectionable that cities treat similarly situated wireless providers in a competitively neutral manner, the inclusion of other public service or municipally-owned utilities (for example, water, storm sewer, sanitation) is objectionable and possibly eliminates the ability of cities to charge any amount. It will be difficult to make meaningful comparisons with these other public/municipal property uses to the value that wireless providers get from the use of the property/facility. Rates for municipal utility or public service use of city property/facilities should be not used as the benchmark for the leases for private, for-profit use. At most it should only be for municipal utility uses for competitive commercial communications services offered by the city. In a similar fashion, the cumbersome process in subsection (e)(2) requiring appraisers is both costly and unnecessary for the parties to determine a market rate. Finally, cities should be allowed to include a multiplier to increase the rent during the term of the lease - a common provision in nearly all public and private wireless facility leases.

Small Cell Applications

(Second) Subsection (f) - This subsection allows small cell network applicants to seek only one permit for its small cell facilities within the city. For a city the size of Overland Park, this provision is unmanageable. With several thousand street lights and buildings, this requirement would overwhelm staff. Furthermore, this provision does not take into account that each location has individual and specific facts requiring individual attention. For example, some sites require pole replacement requiring load and other technical review; some sites require accessory structures and power sources requiring special review; some sites require specific interaction and relocation of other facilities. A better alternative would be to impose a reasonable time limit for review of these applications and individual sites.

In conclusion, the City of Overland Park is opposed to Senate Bill No. 401 in its current form. The City is willing to meet and work with the industry in an attempt to fairly address the industry's concerns while protecting our residents, businesses and other property owners as allowed by federal law.

Thank you for the opportunity to comment on this piece of legislation.