

SESSION OF 2016

**SUPPLEMENTAL NOTE ON SENATE SUBSTITUTE FOR
HOUSE BILL NO. 2131**

As Amended by Senate Committee of the Whole

Brief*

Senate Sub. for HB 2131 would create new law concerning the siting of wireless telecommunications infrastructure and the permit application process between wireless service providers and municipalities. In addition, the bill would amend existing law regarding rural telephone companies and the Kansas Universal Service Fund (KUSF). The bill would make several changes to how a rural telephone company changes its local service rates, how KUSF support for rate of return carriers is determined, and the regulation of rural telephone companies that use VoIP or IP-enabled services.

[*Note:* VoIP, or Voice over Internet Protocol, is technology that allows its user to make voice calls using a broadband Internet connection instead of a regular (or analog) phone line.]

***Siting of Wireless Telecommunications Infrastructure
(New Section 1 and Section 2)***

The bill would establish the Kansas Legislature finds and declares that wireless facilities are critical for Kansas citizens to have access to broadband and other advanced technology and information, along with the facilities being critical for the state's economy, and that the facilities are matters of statewide concern and interest.

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

Definitions

The following terms would be among the 24 terms defined in the bill:

- “Authority” would mean any governing body, board, agency, office, or commission of a city, county, or the State that is authorized by law to make legislative, quasi-judicial, or administrative decisions concerning an application. “Authority” would not include any school district, as defined in law, or any court having jurisdiction over land use, planning, zoning, or other decisions made by an Authority.
- “Public right-of-way” would mean only the area of real property in which the Authority has a dedicated or acquired right-of-way interest in the real property. It would include the area on, below, or above the present and future streets, alleys, avenues, roads, highways, parkways, or boulevards dedicated or acquired as right-of-way. “Public right-of-way” would not include any state, federal, or interstate highway right-of-way, which generally includes the area that runs contiguous to, parallel with, and is generally equidistant from the center of that portion of the highway improved, designed, or ordinarily used for public travel.
- “Small cell facility” would mean a wireless facility that meets both of the following qualifications:
 - Each antenna is located inside an enclosure of no more than six cubic feet in volume, or in the case of an antenna that has exposed elements, the antenna and all of the antenna’s exposed elements could fit within an imaginary enclosure of no more than six cubic feet; and

- Primary equipment enclosures that are no larger than 17 cubic feet in volume, or facilities comprised of such higher limits as the Federal Communications Commission (FCC) has excluded from review pursuant to federal law. Associated equipment may be located outside the primary equipment and, if so located, is not to be included in the calculation of equipment volume. (Under the bill, associated equipment would include, but not be limited to, any electric meter, concealment, telecommunications demarcation box, ground-based enclosures, back-up power systems, grounding equipment, power transfer switch, cut-off switch, and vertical cable runs for the connection of power and other services.)
- “Small cell network” would mean a collection of interrelated small cell facilities designed to deliver wireless service; and
- “Wireless facility” would mean equipment at a fixed location that enables wireless communications between user equipment and a communications network, including, but not limited to:
 - Equipment associated with wireless services such as private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul; and
 - Radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies and comparable equipment, regardless of technological configuration.

Fees

The bill would establish the application process for the siting of a wireless facility, including:

- The types of fees that an Authority could or could not charge or assess;
- The expenses that an Authority could incur during an application review; and
- The cap on total charges and fees that could be assessed by the Authority.

In addition, the Authority would not be allowed to charge a fee to locate a wireless facility or support structure on any public right-of-way controlled by the Authority, if the Authority does not charge other providers for the same use. If the Authority does charge other providers, then the fee charged to locate a wireless facility would be required to be competitively neutral and not unreasonable or discriminatory.

Construction, Maintenance, and Operation of Wireless Services within the Public Right-of-way

The wireless service provider would have the right to construct, maintain, and operate wireless services along, across, upon, under, or above the public right-of-way. The bill would further specify this provision should not be interpreted to grant any right to construct, maintain, or operate wireless services on property owned by the Authority outside the public right-of-way.

The right to construct, maintain, and operate wireless services within the public right-of-way would always be subject and subordinate to the reasonable public health, safety, and welfare requirements and regulations of the Authority, about which the Authority could exercise its Home Rule powers, so long as doing so was competitively neutral

and not unreasonable. Additionally, the Authority could prohibit use or occupation of a part of the public right-of-way due to a reasonable public interest, so long as the reason is competitively neutral and not unreasonable or discriminatory.

The Authority would be permitted to require a wireless services provider to repair damage to a public right-of-way that is caused by the activities of that provider or provider's agent while occupying, installing, repairing, or maintaining facilities in the public right-of-way. The Authority also would have the ability to request a wireless services provider to relocate or adjust its facilities within the public right-of-way at no cost to the Authority, as long as the request similarly binds all users of the right-of-way. The bill would require the Authority to provide advance notice and for the relocation be directly related to public health, safety, or welfare.

The Authority would have a cause of action against a provider for violation of this law that causes damages and could recover damages, including reasonable attorney fees, if the provider is found liable by a court of competent jurisdiction.

Wireless services and infrastructure providers would be required to indemnify and hold the Authority harmless against any all claims, lawsuits, judgments, costs, liens, losses, expenses, and fees to the extent that it is found by a court of competent jurisdiction to be caused by the negligence of the wireless services or infrastructure provider.

An Authority would have the ability to enter into a lease with an applicant for the use of public lands, buildings, and facilities, with the offered leases being at least ten years in duration, unless otherwise agreed to by both the applicant and the Authority, and at market rates. Charges for placement of wireless facilities on public lands, if the Authority chooses to charge, would be required to be competitively neutral and not unreasonable, discriminatory, or in violation of existing federal or state law.

Limits on the Authority

To ensure uniformity across the State with respect to consideration of every application, the bill would establish 18 restrictions on the Authority regarding what information can or cannot be required during the application process. The bill would specify that the new law would not apply to military installations and would clarify that the Authority could not impose restrictions at or near civilian airports. The bill also would require the Authority to consider input from property owners adjoining the affected public right-of-way.

Small Cell Networks

Applicants for small cell networks involving no more than 25 individual small cell facilities of substantially similar design would be permitted to file a consolidated application and receive a single permit for the installation, construction, maintenance, and repair of a small cell network, instead of filing separate applications for each individual facility. The Authority would be required to render a decision no later than 60 days after the submission of an application regarding small cell facilities.

Timing for Review

The Authority would be required to review an application, make a final decision, and advise the applicant of the decision in writing within 150 calendar days of receiving an application for a new wireless support structure or within 90 calendar days of receiving an application for a substantial modification to an existing wireless support structure, or any other application that would not constitute an eligible facilities request as defined in federal law.

The bill also would provide for a time period when applications are found to be incomplete and would require approval of an application if the Authority fails to act on an

application within the required time frame. The Authority could not institute any moratorium on applications.

Interior Structures

The bill would allow the Authority to continue to exercise zoning, land use, planning, and permitting authority within the Authority's territorial boundaries, with regard to the siting of new or the modification of existing wireless structures. The bill would restrict the Authority's ability to exercise any zoning or siting jurisdiction, authority, and control over the construction, installation, or operation of any small cell facility or distributed antennae system located in an interior structure or upon the site of any campus, stadium, or athletic facility.

Definition of "Provider" Clarified (Section 2)

The bill would specify the definition of "provider" as defined in existing statute would not include an applicant as defined in New Section 1.

Effective Date

The provisions of New Section 1 and Section 2 would take effect on and after October 1, 2016, and upon publication in the statute book.

Kansas Universal Service Fund (Sections 3 – 7)

Limitation on Use of KUSF (Section 3)

The bill would restrict a local exchange carrier (LEC) electing to operate under traditional rate of return regulation, or an entity in which a carrier directly or indirectly owns an equity interest of 10.0 percent or more, from using KUSF funding. An exception would exist for Kansas Lifeline Service Program purposes for the purpose of providing

telecommunication services in an area outside the carrier's authorized service area.

***Price Regulation of Telecommunications Services
(Section 4)***

Rates for the initial residential local exchange access line and up to four business local exchange access lines at one location would remain subject to price cap regulation and all other rates, except rates for switched-access services, would be deemed price-deregulated.

In addition, the LEC would be authorized to adjust such rates, without the Kansas Corporation Commission's (KCC) approval, by not more than the greater of the percentage increase in the consumer price index for all urban consumers or the amount necessary to maintain the local rate floor as determined by the FCC in any one-year period, and the rates could not be adjusted below the price floor established in existing law.

Reporting Requirements

The bill would remove the requirement for the KCC to determine the weighted, statewide average rate of non-wireless basic local telecommunications service and telecommunications services in exchanges that have been price-deregulated and report that information annually to the Governor, the Legislature, and each member of the standing committees of the House and Senate that are assigned telecommunications issues. The bill also would eliminate the KCC's annual reporting requirement on the current rates for services provided by all telecommunications carriers, services in price-deregulated exchanges, service offerings, and number of competitors in price-deregulated exchanges.

Individual Customer Pricing

The bill would allow a LEC to offer individual customer pricing without prior approval by the KCC. In response to a complaint filed with the KCC that an individual customer pricing agreement is priced below the price floor set forth in existing statute, the KCC would be required to issue an order within 60 days after the filing, unless the complainant agrees to an extension.

Application by Rural Telephone Companies; FUSF Support (Section 5)

The KCC would be required to approve an application within 45 days by a rural telephone company to increase the company's local service rates in a necessary amount for the company to maintain eligibility for full Federal Universal Service Fund (FUSF) support. If the KCC does not approve the application within 45 days, the application would be deemed approved.

KUSF Contributions and Support; Regulation (Sections 6 and 7)

The bill would change the required contributions to the KUSF to be based upon the provider's intrastate telecommunications services net retail revenues on an equitable and non-discriminatory basis. Current law requires KUSF contributions to be on an equitable and non-discriminatory basis. In addition, the KCC would be restricted from requiring any provider to contribute to the KUSF under a different contribution methodology than the provider uses for purposes of the FUSF, including for bundled offerings.

Additionally, for each LEC electing to operate under traditional rate of return regulation, all KUSF support would ensure the reasonable opportunity for recovery of the carrier's intrastate embedded costs, revenue requirements,

investments, and expenses, subject to the annual cap of \$30.0 million.

No KUSF support received by a LEC electing to operate under traditional rate of return regulation would be allowed to be used to offset any reduction of FUSF support for recovery of the carrier's interstate costs and investments.

In any year the total KUSF support for carriers would exceed the annual cap of \$30.0 million, each carrier's KUSF support would be proportionately based on the amount of support each carrier would have received, absent the cap.

The bill also would specify that existing law regarding regulation of VoIP services, IP-enabled services, or any combination thereof should not be construed to modify the regulation of any rural telephone company.

Background

Senate Sub. for HB 2131 contains the provisions of SB 346 and SB 401, both as amended in the Senate Committee on Utilities. The original contents of HB 2131, described below, were removed with the adoption of the substitute bill. Information on SB 346 and SB 401 also is detailed below.

HB 2131, as amended by the House Committee of the Whole during the 2015 Legislative Session, would have extended the sunset date on the statutory transfers to the Abandoned Oil and Gas Well Fund of the Kansas Corporation Commission and eliminated a quarterly transfer from the State Water Plan Fund to the Abandoned Oil and Gas Well Fund. The contents of HB 2131 were added to HB 2231 in a 2015 Legislative Session Conference Committee report, and the Governor signed HB 2231 into law on May 7, 2015.

Senate Committee of the Whole Action

The Senate Committee of the Whole adopted the following amendments to Senate Sub. for HB 2131:

- Adding the definition for “search ring”;
- Clarifying that the provider is responsible, in the event of damage to a public right-of-way during its activities, for returning the right-of-way to the condition in which it existed before the damage;
- Adding language that if an Authority incurs damages resulting from a violation, then the Authority would have a cause of action against a provider for the violation and could recover damages if found liable by a court of competent jurisdiction;
- Clarifying the Authority cannot impose any restrictions at or near civilian airports and the new law proposed by the bill does not apply to any military installations; and
- Requiring the Authority to consider input from property owners adjoining the affected public right-of-way.

Information regarding the fiscal note for Senate Sub. for HB 2131 is found at the conclusion of this Supplemental Note.

SB 346 Background (KUSF)

SB 346 was introduced by the Senate Committee on Utilities, which also held a hearing and adopted amendments on the bill.

At the Senate Committee hearing on SB 346, testimony in favor of the bill was presented by Senator Abrams and representatives of Pioneer Communications, Rainbow Communications, and Central National Bank. Written testimony in favor of the bill was provided by representatives

of the City of Norton and Norton County, Nortonville Public Library, and the Kansas State Librarian.

Neutral testimony on the bill was presented by representatives of CenturyLink and Sprint, a member of Kansas Farm Bureau, and the Director of the KU Center for Telemedicine. Neutral written testimony was provided by a representative of CTIA – The Wireless Association.

Opponent testimony was presented by representatives of the KCC, Kansas Cable Telecommunications Association, and Eagle Communications.

The Senate Committee adopted several amendments to SB 346, including:

- Restrictions on LECs for using KUSF funding;
- KUSF support proportionality if support goes over the annual cap;
- KUSF contributions;
- Application approval process for rural telephone companies to increase local service rates;
- Deletion of reporting requirements;
- Rates for access lines and the authority to adjust the rates without KCC approval;
- Authority to adjust individual customer pricing with KCC approval and filing a complaint; and
- Statutory reference updates for both state and federal law.

The Senate Committee inserted the contents of SB 346, as amended, into HB 2131, and recommended it as a Senate Substitute bill.

The revised fiscal note released on February 1, 2016, by the Division of the Budget on the original version of SB 346 states revenues and disbursements associated with the KUSF are not a part of the KCC budget. According to the agency, passage of SB 346 would result in sizable increases in both revenues to and disbursements from the KUSF. Because there is no language included in the bill to limit the amount that an individual carrier could recover from the KUSF and no cap on the total distribution amount, the KCC initially estimated that contributions to the KUSF from all carriers would need to be increased by nearly 23.0 percent. This percentage increase was based on 2014 data.

Since the issuance of the original fiscal note, the KCC has received 2015 data from the KUSF Administrator which indicates that passage of SB 346, as introduced, would cause an increase in contributions to the KUSF from all carriers of more than 38.0 percent, from the current rate of 6.53 percent of all assessable intrastate retail revenues to 9.04 percent. While the KCC estimated that disbursements would increase by \$11.1 million in FY 2017 and FY 2018, the 2015 data would change the estimated amount of the increase to \$17.1 million in FY 2017 and FY 2018. It is expected that over time the increase would be much larger due to future reductions in federal support and the implication of the bill language that recovery of all a carrier's intrastate costs would be allowed. Any fiscal effect associated with SB 346, as introduced, is not reflected in *The FY 2017 Governor's Budget Report*.

SB 401 Background (Wireless facilities, public right-of-way)

SB 401 was introduced by the Senate Committee on Utilities, which also held a hearing and adopted amendments on the bill.

At the Senate Committee hearing on SB 401, testimony in favor of the bill was presented by representatives of Sprint and AT&T. Written testimony in favor of the bill was provided

by representatives of CTIA—The Wireless Association and Verizon.

Neutral testimony on the bill was presented by a representative of CenturyLink and neutral written testimony was provided by a representative of the Kansas Department of Transportation (KDOT).

Opponent testimony was presented by representatives of the Kansas Association of Counties, League of Kansas Municipalities, City of Lenexa, City of Overland Park, and the City of Wichita. Written testimony in opposition to the bill was provided by representatives of the City of Derby, City of El Dorado, City of Garden City, City of Lawrence, City of Manhattan, City of Prairie Village, City of Salina, City of Shawnee, Johnson County, and Water District No. 1 of Johnson County (WaterOne).

The Senate Committee adopted several amendments to SB 401, including:

- Existing definitions' modifications and insertion of new definitions;
- Application review;
- The Authority's regulatory authority and limits of that authority regarding wireless services and infrastructure providers constructing, maintaining, and operating within the public right-of-way;
- Application time lines;
- Effective date; and
- Statutory reference updates for both state and federal law.

The Senate Committee inserted the contents of SB 401, as amended, into HB 2131, as a Senate Substitute bill.

The fiscal note prepared by the Division of the Budget on SB 401, as introduced, stated the KCC reports passage of the bill would have no fiscal effect on agency operations. The Kansas Association of Counties states due to restrictions placed on fees that could be charged by authorities, passage of the bill could reduce revenues to counties; however, the estimate of the amount of that reduction is unknown. The League of Kansas Municipalities states passage of the bill could have a fiscal effect upon cities that currently have agreements with telecommunication companies regarding colocation of equipment and possibly on cities that subsequently would be approached by telecommunication companies; however, the fiscal effect is unknown.

The revised fiscal note issued on February 10, 2016, states KDOT completed its analysis of the fiscal effect passage of the bill could have on agency operations. The KDOT states, although the bill allows authorities to assess competitively-neutral charges for the use of a public right-of-way, the bill does not require a wireless service provider to apply to use a public right-of-way, which means there is no effective mechanism in the bill for charging fees. In addition, the agency states that due to the lack of definitions in the bill, all KDOT property could be deemed to constitute “public right-of-way” or “public lands, buildings and facilities.” Any use of right-of-way purchased with federal funds would require payment of market value for that use under Federal Highway Administration regulations, but the agency states the bill would not allow KDOT to comply with that requirement. The agency indicates passage of SB 401 would put it in conflict with federal regulations and would jeopardize \$371.2 million in federal receipts anticipated for FY 2017. Any fiscal effect associated with SB 401 is not reflected in *The FY 2017 Governor’s Budget Report*.

Corrected Fiscal Note on Senate Sub. for HB 2131

The Division of the Budget issued a corrected fiscal note on Senate Sub. for HB 2131 on March 2, 2016.

This fiscal note states revenues and disbursements associated with the KUSF are not a part of the KCC budget. The KCC estimates the fiscal impact of passage of this bill to be \$769,049, which is the difference between the \$30.0 million cap and the \$29,230,951 amount of annual KUSF support rate of return carriers are expected to receive in KUSF Year 20. The previous version of this fiscal note transposed digits in the amount of the fiscal impact. If the \$30.0 million cap is altered or removed, the fiscal impact would be a minimum of \$17.1 million. This figure is based on the reduction in federal universal service support to rate of return carriers between 2013 and 2015. The impact could be even larger if the language reaffirming the cap is removed and the courts interpret the proposed language “ensure the reasonable opportunity for recovery of” to allow recovery of currently disallowed expenses. The KCC finds it difficult to quantify the fiscal effect of such an interpretation.

The KDOT states passage of the bill would have no fiscal effect on the agency.

The Kansas Association of Counties reports, due to restrictions placed on fees that could be charged by authorities, passage of the bill could reduce revenues to counties. However, the Association is unable to estimate what the amount of that reduction might be.

The League of Kansas Municipalities reports enactment of the bill could have a fiscal effect upon cities that currently have agreements with telecommunications companies regarding colocation of equipment and possibly on cities that subsequently would be approached by telecommunications companies. The League is unable, however, to determine the extent of the effect.

Any fiscal effect associated with passage of Senate Sub. for HB 2131 is not reflected in *The FY 2017 Governor's Budget Report*. (This fiscal note was issued prior to Senate Committee of the Whole action.)