

TESTIMONY BEFORE
HOUSE COMMITTEE ON ENERGY, UTILITIES AND TELECOMMUNICATIONS

REGARDING HOUSE BILL 2451
RELATED TO ENACTING THE STATEWIDE BROADBAND
DEPLOYMENT AUTHORIZATION ACT

FEBRUARY 7, 2018

Mr. Chairman and Committee Members:

The Kansas Department of Transportation (“KDOT”) is providing written testimony in opposition of HB 2451. The bill provides that once a rural broadband service provider has been issued an authorization by the Kansas Corporation Commission (“KCC”) to provide service to a particular area, that provider can construct a broadband system “over public rights-of-way and through easements that are within the service area of [the] broadband service provider.”¹ KDOT notes that the term “public rights-of-way” is not defined in the bill, and, therefore, KDOT must assume that it includes all property KDOT owns or utilizes for state highway right-of-way purposes. As drafted, this provision of the bill conflicts with the Secretary of Transportation’s authority and obligation to govern the use of state highway right-of-way, conflicts with federal law and regulations, and jeopardizes the state’s ability to receive federal highway funding in the future.

Conflicts with the Secretary of Transportation’s Authority

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

Since 1959, KDOT has 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

¹ HB 2451, Section 3 (j).

highway system. The UAP has been regularly updated to address the changing needs of utilities,² and it contains criteria for granting permits for various types of utilities on state highway right-of-way. Types of utility facilities on highway right-of-way vary greatly and must be evaluated individually based on factors applicable to the type of facility and location or placement requested. Utility facilities include above-ground installations, under-ground installations, attachments to bridges or other structures, installations near retaining wall systems, and 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 KDOT to adhere to established engineering standards to protect the integrity of state highway infrastructure and to provide for safe highway facilities for travelers.

The permitting procedure under the UAP has successfully balanced the needs of utilities with KDOT's responsibilities for over a half-century. Moreover, permits issued by KDOT in accordance with these procedures provide protections to the state by specifying the terms and conditions of the use of state highway right-of-way, including such matters as: (1) traffic control during construction or maintenance activities, (2) liability for any damages resulting from utility installation, (3) documentation of liability insurance, (4) notification to the agency when beginning work and upon 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 for violations by the utility of the permit requirements.

In addition, granting a broadband service provider blanket authorization to construct their facilities on state highway right-of-way without adherence to KDOT's Utility Accommodation Policy also directly conflicts with federal regulations issued by the Federal Highway Administration ("FHWA FHWA regulations impose many requirements for placement of public utilities on right-of-way of Interstate Highways, highways that are part of the National Highway System, and any state highways that were constructed as part of a project in which federal funds were used.³ While it is not necessary here to delve into the specifics of each requirement, it is important to note that FHWA mandates that all state transportation departments develop a Utility Accommodation Policy that complies with federal and state laws and regulations,⁴ and that those policies must be submitted to FHWA for its review and approval.⁵ As a condition of receipt of future federal highway funding, KDOT must comply with its FHWA-approved UAP regarding any utility that is occupying or seeks to occupy right-of-way of Kansas highways that received any federal funding.

The unqualified authorization in HB 2451 to allow construction of a broadband system over public rights-of-way negates the statutory authority of the Secretary to determine where, and under what conditions, utility systems are to be placed on state highway right-of-way. Ultimately, the bill renders the current and future needs of the state highway system, as determined by the Secretary, subordinate to the

² The current KDOT UAP, adopted in 2007, is available at:
http://www.ksdot.org/Assets/wwwksdotorg/bureaus/burConsMain/Connections/UAP2007_2016_aug.pdf

³ See generally, 23 C.F.R. Part 645.

⁴ 23 C.F.R. 645.211.

⁵ 23 C.F.R. 645.215.

interests of broadband service providers. Unlike other utilities placed upon state highway right-of-way, there is no requirement for a broadband service provider to apply to the Secretary for a permit to work on KDOT right-of-way or to place its system in an approved location on KDOT right-of-way. Allowing broadband service providers the unfettered ability to construct broadband systems on state highway right-of-way without first obtaining a permit under KDOT's UAP deprives the state of the protections afforded by a permit, and jeopardizes current utilities and state highway structures on the right-of-way. It further allows those providers the arbitrary ability to avoid KDOT's established regulations and policies, while all other utilities utilizing state highway right-of-way must comply with those policies.

Further, because FHWA is the ultimate approving authority for use of Interstate right-of-way, HB 2451 removes federally-mandated FHWA oversight of Interstate right-of-way located within Kansas. The consequence for failure to comply with FHWA requirements is the potential loss of the state's ability to receive future federal funding for state highway projects.

Conclusion

KDOT is supportive of the stated purpose of HB 2451. However, KDOT cannot support the bill unless "public rights-of-way" is defined to exclude KDOT-owned state highway right-of-way. KDOT, under its FHWA-approved UAP, must continue to have authority and oversight over public utility use of state highway right-of-way. The ability of broadband service providers to use all "public rights-of-way" under this bill undermines the statutory duties the Secretary of Transportation owes to the state, conflicts with federal law and regulations, and jeopardizes the state's ability to receive future federal highway funds.

As stated, KDOT opposes HB 2451 as written; however, the agency 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.