

2018 Kansas Statutes

66-2019. Siting of wireless infrastructure; public lands and public right-of-way; wireless providers and governing bodies, rights and requirements for application process. (a) The Kansas legislature finds and declares that:

(1) The permitting, construction, modification, maintenance and operation of wireless facilities are critical to ensuring that all citizens in the state have true access to broadband and other advanced technology and information;

(2) these facilities are critical to ensuring that businesses and schools throughout the state remain competitive in the global economy;

(3) wireless telecommunications facilities that enable broadband services have a significant economic benefit; and

(4) the permitting, construction, modification, maintenance and operation of these facilities, to the extent specifically addressed in this section, are declared to be matters of statewide concern and interest.

(b) As used in this section:

(1) "Accessory equipment" means any equipment serving or being used in conjunction with a wireless facility or wireless support structure including, but not limited to, utility or transmission equipment, power supplies, generators, batteries, cables, equipment buildings, cabinets and storage sheds, shelters or similar structures.

(2) "Antenna" means communications equipment that transmits or receives electromagnetic radio signals used in the provision of wireless services.

(3) "Applicant" means any person or entity that is engaged in the business of providing wireless services or the wireless infrastructure required for wireless services and that submits an application.

(4) "Application" means a request submitted by an applicant to an authority for: (A) The construction of a new wireless support structure or new wireless facility;

(B) the substantial modification of a wireless support structure or wireless facility; or

(C) collocation of a wireless facility or replacement of a wireless facility.

(5) "Authority" means 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" shall not include any school district as defined in K.S.A. 72-6486, and amendments thereto, or any court having jurisdiction over land use, planning, zoning or other decisions made by an authority.

(6) "Base station" means a station that includes a structure that currently supports or houses an antenna, transceiver, coaxial cables, power cables or other associated equipment at a specific site that is authorized to communicate with mobile stations, generally consisting of radio transceivers, antennas, coaxial cables, power supplies and other associated electronics. "Base station" does not mean a tower or equipment associated with a tower and does not include any structure that, at the time the relevant application is filed with the authority, does not support or house equipment described in this paragraph.

(7) "Collocation" means the mounting or installation of wireless facilities on a building, structure, wireless support structure, tower, utility pole, base station or existing structure for the purposes of transmitting or receiving radio frequency signals for communication purposes.

(8) "Distributed antenna system" means a network that distributes radio frequency signals and consisting of: (A) Remote communications or antenna nodes deployed throughout a desired coverage area, each including at least one antenna for transmission and reception;

(B) a high capacity signal transport medium that is connected to a central communications hub site; and

(C) radio transceivers located at the hub's site to process or control the communications signals transmitted and received through the antennas to provide wireless or mobile service within a geographic area or structure.

(9) "Existing structure" means a structure that exists at the time an application to collocate wireless facilities on a structure is filed with an authority. The term includes any structure that is currently supporting or designed to support the attachment of wireless facilities, including, but not limited to, towers, buildings and water towers.

(10) "Public lands, buildings and facilities" does not include any real property, structures or facilities under the ownership, control or jurisdiction of the secretary of transportation.

(11) "Public right-of-way" means only the area of real property in which the authority has a dedicated or acquired right-of-way interest in the real property. It shall 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" does 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.

(12) "Replacement" includes constructing a new wireless support structure of comparable proportions and of comparable height or such other height that would not constitute a substantial modification to an existing structure in order to support wireless facilities or to accommodate collocation and includes the associated removal of the pre-existing wireless facilities, if any, or wireless support structure.

(13) "Search ring" means a shape drawn on a map to indicate the general area within which a wireless services support structure should be located to meet radio frequency engineering requirements, taking into account other factors, including topography and the demographics of the service area.

(14) "Small cell facility" means a wireless facility that meets both of the following qualifications: (A) 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

(B) 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 has excluded from review pursuant to 54 U.S.C. § 306108. Associated equipment may be located outside the primary equipment, and if so located, is not to be included in the calculation of equipment volume. Associated equipment includes, but is not 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.

(15) "Small cell network" means a collection of interrelated small cell facilities designed to deliver wireless service.

(16) "Substantial modification" means a proposed modification to an existing wireless support structure or base station that will substantially change the physical dimensions of the wireless support structure or base station under the objective standard for substantial change, established by the federal communications commission pursuant to 47 C.F.R. 1.40001.

(17) "Transmission equipment" means equipment that facilitates transmission for a wireless service licensed or authorized by the federal communications commission including, but not limited to, radio transceivers, antennas,

coaxial or fiber optic cable and regular and backup power supply. "Transmission equipment" includes equipment associated with wireless services including, but not limited to, private, broadcast and public safety services such as wireless local area network services, and services utilizing a set of specifications developed by the institute of electrical and electronics engineers for interface between a wireless client and a base station or between two wireless clients, as well as unlicensed wireless services and fixed wireless services, such as microwave backhaul.

(18) "Wireless facility" means equipment at a fixed location that enables wireless communications between user equipment and a communications network, including, but not limited to: (A) 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

(B) radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies and comparable equipment, regardless of technological configuration.

"Wireless facility" does not mean any wired connections from a wireless support structure or base station to a hub or switching location.

(19) "Wireless services" means "personal wireless services" and "personal wireless service facilities" as defined in 47 U.S.C. § 332(c)(7)(C), including commercial mobile services as defined in 47 U.S.C. § 332(d), provided to personal mobile communication devices through wireless facilities or any fixed or mobile wireless services provided using wireless facilities.

(20) "Wireless infrastructure provider" means any person that builds or installs transmission equipment, wireless facilities or wireless support structures, but that is not a wireless services provider.

(21) "Wireless support structure" means a freestanding structure, such as a monopole, guyed or self-supporting tower or other suitable existing or alternative structure designed to support or capable of supporting wireless facilities. "Wireless support structure" shall not include any telephone or electrical utility pole or any tower used for the distribution or transmission of electrical service.

(22) "Utility pole" means a structure owned or operated by a public utility as defined in K.S.A. 66-104, and amendments thereto, a municipality as defined in K.S.A. 75-6102, and amendments thereto, or an electric cooperative as defined in K.S.A. 2018 Supp. 17-4652, and amendments thereto, that is designed specifically for and used to carry lines, cables or wires for telecommunications, cable, electricity or to provide lighting.

(23) "Water tower" means a water storage tank or a standpipe, or an elevated tank situated on a support structure that was originally constructed for use as a reservoir or facility to store or deliver water.

(24) "Wireless services provider" means a provider of wireless services.

(c) (1) An authority shall not charge an application fee, consulting fee or other fee associated with the submission, review, processing and approval of an application that is not required for other wireless infrastructure providers or wireline telecommunications or broadband providers within the authority's jurisdiction.

(2) An authority shall only assess fees or charges for the actual costs relating to the granting or processing of an application that are directly incurred by the authority and the authority shall not charge any market-based or value-based fees for the processing of an application. Such fees and charges shall be reasonably related in time to the occurrence of such costs.

(3) An authority or any third-party entity shall not include any travel expenses incurred in the review of an application for more than one trip per application to the authority's jurisdiction and an applicant shall not be required to pay or reimburse an authority for a consultant or other third-party fees based on a contingency-based or results-based arrangement. Any travel expenses included must be reasonable and directly related to the application.

(4) The total charges and fees assessed by the authority shall not exceed:

(A) \$500 for a collocation application, that is not a substantial modification, small cell facility application or distributed antenna system application; or

(B) \$2,000 for an application for a new wireless support structure or for a collocation application that is a substantial modification of a wireless support structure.

(d) (1) An authority may not charge a wireless services provider or wireless infrastructure provider any rental, license or other fee to locate a wireless facility or wireless support structure on any public right-of-way controlled by the authority, if the authority does not charge other telecommunications or video service providers, alternative infrastructure or wireless services providers or any investor-owned utilities or municipally-owned commercial broadband providers for the use of public right-of-way. If an authority does assess a charge, including a charge or rental fee for attachment to the facilities owned by the authority in the right-of-way, any such charge must be competitively neutral, with regard to other users of the public right-of-way, including investor-owned utilities or municipally-owned commercial broadband providers, and may not be unreasonable or discriminatory or violate any applicable state or federal law, rule or regulation.

(2) (A) Subject to the provisions of this subsection, a wireless services provider or wireless infrastructure provider, subject to an application, shall have the right to construct, maintain and operate wireless support structures, utility poles, small cell wireless facilities or distributed antenna systems along, across, upon, under or above the public right-of-way. The authority must be competitively neutral with regard to other users of the public right-of-way, may not be unreasonable or discriminatory and may not violate any applicable state or federal law, rule or regulation.

(B) Nothing in this subsection (d) shall be interpreted as granting a wireless services provider or wireless infrastructure provider the right to construct, maintain or operate any facility or related appurtenance on property owned by the authority outside of the public right-of-way.

(C) The right of a wireless services provider or wireless infrastructure provider to use and occupy the public right-of-way shall always be subject and subordinate to the reasonable public health, safety and welfare requirements and regulations of the authority. An authority may exercise its home rule powers in its administration and regulation related to the management of the public right-of-way provided that any such exercise must be competitively neutral and may not be unreasonable or discriminatory.

(D) The authority shall have the right to prohibit the use or occupation of a specific portion of public right-of-way by a provider due to a reasonable public interest necessitated by public health, safety and welfare so long as such interest is exercised in a competitively neutral manner and is not unreasonable or discriminatory.

(E) A wireless services provider or wireless infrastructure provider shall comply with all laws and rules and regulations governing the use of public right-of-way.

(F) An authority may require a wireless services provider or wireless infrastructure provider to repair all damage to a public right-of-way caused by the activities of that provider, or of any agent, affiliate, employee or subcontractor of that provider, while occupying, installing, repairing or maintaining facilities in a public right-of-way and to return the right-of-way to the condition in which it existed prior to the damage. If a wireless services provider or wireless infrastructure provider fails to make the repairs required by an authority, the authority may effect those repairs and charge the provider the reasonable cost of those repairs. If an authority incurs damages as a result of a violation of this paragraph, then the authority shall have a cause of action against a wireless

services provider or wireless infrastructure provider for violation of this paragraph, and may recover its damages, including reasonable attorney fees, if such provider is found liable by a court of competent jurisdiction.

(G) If requested by an authority, in order to accomplish construction and maintenance activities directly related to improvements for the health, safety and welfare of the public, a wireless services provider or wireless infrastructure provider shall relocate or adjust its facilities within the public right-of-way at no cost to the authority, as long as such request similarly binds all users of such right-of-way. Such relocation or adjustment shall be completed as soon as reasonably possible within the time set forth in any written request by the authority for such relocation or adjustment, as long as the authority provides the wireless services provider or wireless infrastructure provider with a minimum of 180 days advance written notice to comply with such relocation or adjustment, unless circumstances beyond the authority's control require a shorter period of advance notice. If any such relocation or adjustment is for private benefit, the provider shall not bear the cost of the relocation or adjustment to the extent of such private benefit and the provider shall not be obligated to commence the relocation or adjustment until receipt of funds for such relocation or adjustment. The provider shall have no liability for any delays caused by a failure to receive funds for the cost of such relocation or adjustment and the authority shall have no obligation to collect such funds.

(H) Wireless services providers and wireless infrastructure providers shall indemnify and hold the authority and its officers and employees harmless against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees to include reasonable attorney fees and costs of defense, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including personal or bodily injury or death, property damage or other harm for which recovery of damages is sought, to the extent that it is found by a court of competent jurisdiction to be caused by the negligence of the wireless services provider or wireless infrastructure provider, any agent, officer, director, representative, employee, affiliate or subcontractor of the provider, or their respective officers, agents, employees, directors or representatives, while installing, repairing or maintaining facilities in a public right-of-way. The indemnity provided by this paragraph does not apply to any liability resulting from the negligence of an authority, its officers, employees, contractors or subcontractors. If a provider and the authority are found jointly liable by a court of competent jurisdiction, liability shall be apportioned comparatively in accordance with the laws of this state, without waiving any governmental immunity available to the authority under state law and without waiving any defenses of the parties under state or federal law. This paragraph is solely for the benefit of the authority and the wireless services provider or wireless infrastructure provider and does not create or grant any rights, contractual or otherwise, to any other person or entity.

(I) A wireless services provider or wireless infrastructure provider or authority shall promptly advise the other in writing of any known claim or demand against the provider or the authority related to or arising out of the provider's activities in a public right-of-way.

(3) The provisions of this subsection shall not apply to or affect any authority's jurisdiction over the activities of wireless services providers or wireless infrastructure providers in public utility easements, private easements or on privately owned property.

(4) Nothing in this subsection shall be construed to prevent wireless structures and wireless facilities from being located on state, federal or interstate highway right-of-way in accordance with reasonable policies and procedures adopted by the manager of the state, federal and interstate highway right-of-way under applicable federal and state law.

(e) (1) An authority may enter into a lease with an applicant for the applicant's use of public lands, buildings and facilities. When entering into a lease for use of publicly owned lands, an authority shall offer leases or contracts for applicants to use publicly owned lands that are at least 10 years in duration, unless otherwise agreed to by both the applicant and the authority, and at market rates. Any lease renewals shall be negotiated in good faith. Due to the benefit of increased broadband and wireless services to the citizens of the authority, an authority may choose not to charge for the placement of wireless facilities on public lands. If an authority does charge, any such charges for use of publicly owned lands and facilities must be competitively neutral with regard to other users of the publicly owned lands and facilities, including any investor-owned utilities or municipally owned commercial broadband providers, may not be unreasonable or discriminatory and may not violate any applicable state or federal law, rule or regulation.

(2) If the applicant and the authority do not agree on the applicable market rate for the use or lease of public land and are unable to agree on a process to determine the applicable market rate for any such public land, then the market rate will be determined by a panel of three appraisers. The panel will consist of one appraiser appointed by each party and a third appraiser selected by the two appointed appraisers. Each appraiser will independently appraise the appropriate lease rate and the market rate shall be set at the mean between the highest and lowest market rates among all three independent appraisals, unless the mean between the highest and lowest appraisals is greater than or less than 10% of the appraisal of the third appraiser chosen by the parties' appointed appraisers, in which case the third appraisal will determine the rate for the lease. The appraisal process shall be concluded within 150 calendar days from the date the applicant first tenders a proposed lease rate to the authority. Each party will bear the cost of the party's own appointed appraiser, and the parties shall share equally the cost of the third appraiser chosen by the two appointed appraisers.

(3) Nothing in this subsection shall be construed to prevent wireless structures and wireless facilities from being located on real property, structures or facilities under the ownership, control or jurisdiction of the secretary of transportation in accordance with reasonable policies and procedures adopted by the secretary of transportation under applicable federal and state law.

(4) This subsection (e) shall not apply to public rights-of-way governed by subsection (d).

(f) To ensure uniformity across the state with respect to consideration of every application, an authority shall not:

(1) Require an applicant to submit information about, or evaluate an applicant's business decisions with respect to, the applicant's designed service, customer demand for service or quality of the applicant's service to or from a particular area or site. An authority may require an applicant filing an application for a new wireless support structure to state in such application that the applicant conducted an analysis of available collocation opportunities on existing wireless support structures within the same search ring defined by the applicant, solely for the purpose of confirming that an applicant undertook such analysis;

(2) require information that concerns the specific need for the wireless support structure, including if the service to be provided from the wireless support structure is to add additional wireless coverage or additional wireless capacity. An authority may not require proprietary, confidential or other business information to justify the need for the new wireless support structure, including propagation maps and telecommunications traffic studies;

(3) evaluate an application based on the availability of other potential locations for the placement of wireless support structures or wireless facilities including, but not limited to, the option to collocate, instead of construct, a new wireless support structure or for substantial modifications of a support structure;

(4) dictate the type of transmission equipment or technology to be used by the applicant including, but not

limited to, requiring an applicant to construct a distributed antenna system or small cell facility in lieu of constructing a new wireless support structure or discriminate between different types of infrastructure or technology;

(5) require the removal of existing wireless support structures or wireless facilities, wherever located, as a condition for approval of an application. This paragraph shall not preclude an authority from adopting reasonable rules with respect to the removal of abandoned wireless support structures or wireless facilities;

(6) impose any restrictions at or near civilian airports with respect to objects in navigable airspace height limitations, proximity to civilian airports or markings and lighting on wireless support structures or base stations that are greater than, or in conflict with, any restrictions imposed by the federal aviation administration, except that this paragraph shall not be construed so as to impact any existing height restrictions adopted by an authority as of the effective date of this section on wireless support structures or base stations located at or near civilian airports;

(7) establish or enforce regulations or procedures for radio frequency signal strength or the adequacy of service quality;

(8) impose surety requirements, including bonds, escrow deposits, letters of credit or any other type of financial surety to ensure that abandoned or unused facilities can be removed, unless the authority imposes similar requirements on other permits for other types of commercial development or land uses, and any such instrument cannot exceed a reasonable estimate of the direct cost of the removal of the facility. If surety requirements are imposed, any such requirements shall be competitively neutral, non-discriminatory, reasonable in amount and commensurate with the historical record for local facilities and structures that are abandoned;

(9) discriminate or create a preference on the basis of the ownership of any property, structure, base station or wireless support structure when promulgating rules or procedures for siting wireless facilities or for evaluating applications or require the placement of wireless support structures or wireless facilities on property owned or leased by the authority, but an authority may develop a process to encourage the placement of wireless support structures or wireless facilities on property owned or leased by the authority, including an expedited approval process. Nothing in this subsection shall be construed to hinder or restrict the siting of public safety communications towers, including, but not limited to, police and fire;

(10) impose any unreasonable requirements or obligations regarding the presentation, appearance or function of the wireless facilities and equipment including, but not limited to, those relating to any kinds of materials used and those relating to arranging, screening or landscaping of facilities. In developing such a requirement or obligation for wireless facilities located on a public right-of-way, the authority shall consider input from property owners adjoining the affected public right-of-way;

(11) impose any requirements that an applicant purchase, subscribe to, use or employ facilities, networks or services owned, provided or operated by an authority, in whole or in part, or by any entity in which the authority has a competitive, economic, financial, governance or other interest;

(12) impose environmental testing, sampling or monitoring requirements that exceed federal law;

(13) impose any compliance measures for radio frequency emissions or exposure from wireless facilities that exceed the requirements of the federal communications commission rules for radio frequency;

(14) in conformance with 47 U.S.C. § 332(c)(7)(B)(iv), reject an application, in whole or in part, based on perceived or alleged environmental effects of radio frequency emissions or exposure;

(15) prohibit the use of emergency power systems that comply with federal and state environmental requirements and do not violate local health and safety requirements and local noise control ordinances, but no local regulations shall prevent the provision of emergency power during an actual emergency;

(16) condition or require the approval of an application based on the applicant's agreement to permit any wireless facilities provided or operated, in whole or in part, by an authority or by any other entity to be placed at, or collocated with, the applicant's wireless support structure;

(17) impose a greater setback or fall-zone requirement for a wireless support structure than for other types of commercial structure of a similar size; or

(18) limit, for less than 10 years, the duration of the approval of an application. Any renewals shall be negotiated in good faith. Construction of the approved structure or facilities shall commence within one year of final approval and shall be diligently pursued to completion.

(g) An applicant for a small cell network involving no greater than 25 individual small cell facilities of a substantially similar design within the jurisdiction of a single authority shall be permitted, upon request by the applicant, 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 small cell facility, except that the authority may require a separate application for any small cell facilities that are not of a substantially similar design. The authority shall render a decision no later than 60 days after the submission of an application regarding small cell facilities that satisfies the authority's requirements in a single administrative proceeding.

(h) (1) Within 150 calendar days of receiving an application for a new wireless support structure and within 90 calendar days of receiving an application for a substantial modification to an existing wireless support structure or base station, or any other application for placement, installation or construction of transmission equipment that does not constitute an eligible facilities request as defined by 47 U.S.C. § 1455(a), an authority shall: (A) Review the application in light of the application's conformity with applicable local zoning regulations;

(B) make a final decision to approve or disapprove the application; and

(C) advise the applicant in writing of the authority's final decision, supported by substantial evidence contained in a written record and issued contemporaneously. If an authority denies an application, there must be a reasonable basis for the denial. An authority may not deny an application if such denial discriminates against the applicant with respect to the placement of the facilities of other investor-owned utilities, wireless service providers, wireless infrastructure providers or wireless carriers.

(2) (A) The time period for approval of applications shall begin when the application is submitted and may be tolled within the first 30 days after the submission of the application if the authority notifies the applicant that such application is incomplete, identifies all missing information and specifies the code provision, ordinance, application instruction or otherwise publicly stated procedures that require the information to be submitted.

(B) The time period for approval of applications shall begin running again when the applicant provides the necessary supplemental information. Additionally, the time period for approval of applications may be tolled by the express agreement in writing by both the applicant and the authority.

(3) An application shall be deemed approved if an authority fails to act on an application for a: (A) New wireless support structure within the 150-calendar day review period specified; or

(B) substantial modification to an existing wireless support structure or base station or any other applications for placement, installation or construction of transmission equipment that does not constitute an eligible facilities request as defined by 47 U.S.C. § 1455(a) within the 90 calendar days review period specified.

(4) An authority shall approve applications for eligible facilities requests, as defined by 47 U.S.C. § 1455(a),

within 60 days according to the procedures established by federal law under 47 C.F.R. 1.40001.

(5) An application shall be deemed approved once an applicant has provided notice to the authority that the applicable time periods provided in this section have lapsed.

(6) Within 30 days of the notice provided pursuant to subsection (h)(5), a party aggrieved by the final action of an authority, either by the authority affirmatively denying an application or by the authority's inaction, may bring an action for review in any court of competent jurisdiction.

(i) An authority may not institute any moratorium on the filing, consideration or approval of applications, permitting or the construction of new wireless support structures, substantial modifications of wireless support structures or collocations.

(j) Subject to the provisions of this section and applicable federal law, an authority may 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 wireless support structures, wireless facilities, small cell facilities or utility poles, except that no authority shall have or exercise any zoning or siting jurisdiction, authority or 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.

(k) Nothing in this section shall be construed to apply to military installations.

(l) The provisions of this section shall take effect and be in force on and after October 1, 2016.

History: L. 2016, ch. 40, § 1; July 1.