

FORUM TOPIC: Small Cell Legislation and Effects on Right of Way

DATE: September 14, 2016

**LOCATION: Overland Park Fire Department Training Center;
12401 Hemlock St, Suite 100; Overland Park, KS 66213**

FORUM DOCUMENTATION

Summary: The KC Metro APWA Utilities and Public Right-of-Way Committee hosted a forum for local city, county, and state right-of-way managers and other staff members responsible for managing utility construction within right-of-way. The purpose of the forum is to share ideas for addressing challenges associated with managing small cell legislation as documented by Kansas House Bill #2131. Discussion included the following, which has been organized/categorized by topic.

Topic: General

Discussion: Various general topics were discussed related to this forum, including:

- *Kansas House Bill 2131 becomes effective starting October 1, 2016*
- *Overland Park attorney Steve Horner has produced a reader friendly version of the bill, which has been condensed to 6 pages, and was handed out to all attendees.*
- *Generally speaking, the three primary categories of cellular structures that send and receive signals include:*
 - *Macro Towers (commonly referred to as cell towers)*
 - *Mini Macro Towers (stand-alone poles)*
 - *Monopoles (range from 60' to 80' in height)*
 - *Transport poles (range from 80' to 120' in height)*
 - *Micro Cell Sites (typically mounted to existing infrastructure, such as street light poles, signal poles, and power poles)*
- *Cell providers are reporting that one transport pole provides the equivalent signal coverage as 20 monopoles, which is equivalent to approximately 200 micro cell sites.*

Topic: History

Discussion: The described sequence of events leading up to the current small cell legislation in Kansas House Bill #2131 included the following:

- *Initially, one of the motivations driving small cell technology development was to address the relative lack of cell service for rural areas, due in part to being cost prohibitive.*

- *Small cell technology was pursued because of its affordability as compared to the alternative of using traditional cell towers, which were too expensive to install based on their projected return on investment.*
- *Generally speaking, small cell technology increases the collective overall available bandwidth and increases the reliability and operational capabilities of a given cellular network.*
- *Recent large scale fiber builds in Kansas City put this region in a unique situation that could maximize the effectiveness of local investments in small cell facilities.*
- *Providers are claiming that many of these facilities are truly stand-alone structures, not hardwired to other communications infrastructure.*

Topic: Contents of Kansas House Bill 2131

Discussion: Various pieces of the current legislation were described, paraphrased, and/or discussed. These included:

- *The use of public right-of-way for small cell facilities is subject to the safety and welfare of the public.*
- *One permit can contain 25 proposed locations.*
- *The review time for a permit begins upon submittal by the permittee. If that permit is found to be incomplete during review by the city, the review time is paused, then resumed again upon re-submittal. Note that the review time does not start over. The time allowed for permit approval may only be restarted once.*
- *Maximum permit application review times granted to cities per permit is dependent upon the content of the application:*
 - *Cities are allotted a maximum of 60 days to review applications containing proposed attachments to existing infrastructure.*
 - *Cities are allotted a maximum of 90 days to review applications containing proposals for substantial modifications to an existing wireless support structure or base station.*
 - *Cities are allotted a maximum of 150 days to review applications containing proposals for new structures.*
 - *Initial rejections must occur within the first 30 days if that rejection is to be based on the application being incomplete. When re-submitted, the overall allotted time for review continues from the point at which it was rejected initially. It does not re-start.*
- *If a response of approval or rejection of the permit with documented justification is not provided within the allotted time, the permit application is automatically considered to be approved.*
- *Many reasons are documented as not justifiable means for denying a permit application, which include aesthetics, preferred location, electromagnetic exposure, etc.*
- *One provider's small cell antenna is not allowed to be co-located on the same structure with another provider's antenna.*
- *Any restrictions imposed on new small cell facility installations in a given city must be applied equally to other utility companies and their new facilities as well.*

- *This bill does not change established standards from previous bills requiring utility companies to have franchise agreements with any city in which their facilities are installed.*
- *Cities are required to provide 180 days advanced written notice to the owner of a given small cell facility of a need to relocate for anticipated impacts such as proposed roadway improvements.*
- *Missouri has a similar bill, but it is not identical. Many other states across the nation are at various stages of processing similar legislation as Kansas House Bill 2131.*
- *One city described their plan to focus on negotiating two primary changes to the bill:*
 - *Enable co-location to minimize number of total facilities in their city*
 - *Limit the number of locations to be covered under one permit to significantly less than 25*
- *Regarding tracking permit review times, one city is currently developing a system to track these review time frames. It was also noted by this city that they are approaching a permit app rejection as being applied to all locations under that permit. They hope this will encourage permittees to break up their locations among multiple permits in order to help both the city and the provider in successfully processing permits in a timely manner.*

Topic: Permitting

Discussion: Permitting small cell sites may be challenging for the agency issuing the permits, due mainly to the current language in the legislation allowing up to 25 proposed locations to be documented under a single permit, but also related to the requirements and time frames specified for notification of approval or rejection. Discussion on this topic included:

- *House bill 2131 does not apply to state and federal right of way.*
- *The timelines defining the maximum review period originate from a federal bill associated with wireless communications providers.*
- *One city has drafted an ordinance that states that one permit application must be resolved before a subsequent permit can be submitted.*
- *At this point, since the bill is not yet in effect, various cities hold different interpretations about the potential for litigation associated with permit denial.*
- *In one city, they have mapped out the process of permit review, including review by several departments that may be affected (e.g. planning, landscaping, engineering, street lighting, permitting, maintenance, etc.)*
- *One city encourages other cities to require the owner of the permit to be the company that is actually performing the work.*
- *One city has recently re-structured their permit fees to be based on number of parcels affected, rather than simply per each permit application.*
- *Two cities currently determine a permit fee based on \$40 per parcel effected.*
- *One city's right of way permit tracking software does not allow for 25 different physical sites to be documented under one permit. That city is considering a workaround, possibly requiring 25 separate pieces of documentation, even if submitted under one permit application. One difficulty with that is trying to determine maintenance requirements of those various sites if they are all installed under one permit.*

Topic: Franchise Agreements

Discussion: Several ideas were discussed related to administering franchise agreements with small cell providers. These ideas included:

- *One city does not believe that a franchise agreement is necessary for small cell providers to install facilities in that city's public right of way, while other cities do. The difference of opinion may be based on whether a small cell provider is considered to be a utility company. More discussion may be needed to determine if franchise agreements should be utilized as they are for traditional utility companies. The general consensus is that the small cell provider is a utility and thus is required to sign a franchise agreement.*

Topic: Pole Attachment Agreements

Discussion: Several ideas were discussed related to administering agreements with small cell providers defining the terms and conditions of pole attachments. These ideas included:

- *One city has documented in their pole attachment agreement with a small cell provider that they have certain requirements to satisfy, though they do not have an established franchise agreement.*

Topic: Coordination Within Right-of-Way

Discussion: Several sub-topics were discussed related to coordinating placement of small cell facilities within public right-of-way. Discussion on these topics included:

- *One city believes that a pre-existing city ordinance doesn't allow new stand-alone poles to be placed in right of way for utilities that aren't part of a larger system such as transmission power lines. This is enforced by the provision in the legislation referencing home rule.*
- *That city also has an existing ordinance that states any relocations of existing poles that are in right-of-way must relocate to a location outside of public right of way.*
- *Another city has a similar ordinance that states no new poles are allowed to be placed in right-of-way.*
- *In both of those cities, anything over 60' tall is regulated by zoning laws.*
- *One city has specified that it will not allow installations of new micro cell sites on existing poles to increase the height of that pole by more than 20%, which was decided upon based on an evaluation of current city standards and characteristics of existing poles throughout that city.*
- *For proposed micro cell sites, one city has decided to require a structural engineer from the permittee to demonstrate the existing and/or proposed facility is structurally sound enough to handle the mounting of the micro cell equipment. Also, if a new pole is required to handle the equipment, the city will still own that pole, even if the cell provider installs it as part of their micro cell site installation.*
- *One city is requiring cell providers to have two additional poles readily available to use as replacements if a pole holding a micro cell site is damaged.*
- *One city urges others that coordination of power supply can be a significant issue that should not be overlooked, or assumed to be worked out in the field. This has been an issue because power source accommodations can be intrusive, especially*

in residential areas. Another city's ordinances don't allow above grade utilities in front yards, which can be helpful to avoid these issues.

- *Power for small cell facilities generally cannot be provided by the power sources feeding the existing lights and signals they are mounted to, but rather, need to be provided from the nearest transformer. In addition, this power source typically requires installation of an above ground control cabinet.*
- *Two cities described that they have written into their codes that above grade enclosures within right of way are required to have landscaped screening planted around it, and documented through a landscaping plan.*
- *Question: How is a 120' transport pole able to have a breakaway base? To address this concern, one city is passing legislation requiring a minimum setback from the road if it does not have a breakaway base. It was noted that these types of ordinances cannot be applied to small cell providers unless they are equally applied to all utility providers.*
- *One city is requiring that if utility relocations are required due to the installation of a new utility facility (such as a small cell tower), then the owner of that new facility must coordinate those relocations. This may become more prevalent due to the sizeable foundations of small cell transport poles.*
- *One question that may need more thought is defining terms and conditions of maintenance requirements for small cell facilities.*
- *One small cell provider recommends that city maintenance crews servicing lights and other city-owned facilities near small cell antennas should maintain a six-foot radius of clearance to avoid risk of over-exposure to transmitted radio frequency emissions. Some question whether this poses a risk to public health and safety, but the bill specifically states that "...perceived or alleged environmental effects of radio frequency emissions or exposure" is not a valid reason to reject a permit application.*
- *Many sub-contractors are expected to come in from out of town to perform small cell installation work. To minimize issues with sub-contractors not adhering to local codes and expectations, one city is requiring a pre-activity meeting before installations can begin at a given site to establish clear expectations for working in right of way and how they pertain to each location.*
- *Some cities are much less concerned about small cell attachments to existing lighting facilities as they are about 120' monopole installations within public right of way.*
- *One city is considering master planning with small cell providers as part of new roadway project planning.*
- *One city is concerned about the requirement in House Bill 2131 requiring cities to provide 180 days advanced written notice of a need to relocate for anticipated impacts such as proposed roadway improvements.*
- *One city has established that small cell providers are responsible for notifying adjacent property owners of upcoming installations.*

ACTION ITEMS:

- *Overland Park will make available the following resources for forum attendees:*
 - *Documentation of House Bill 2131*
 - *Relevant right of way ordinance*
 - *Examples of small cell agreements*
 - *A link to the league of municipalities and their relevant resources regarding potential anticipated legal issues*
 - *Steve Horner (Overland Park Attorney) contact information*
- *APWA UPROW Committee will send out a link to these resources*

Attachments

- *List of Forum Attendees*

Copies distributed by e-mail to:

- *Forum Attendees*