Substitute for SENATE BILL No. 449

AN ACT concerning commerce; enacting the video competition act; amending K.S.A. 2005 Supp. 17-1902 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. Sections 1 through 6, and amendments thereto, shall be known and may be cited as the video competition act.

New Sec. 2. For purposes of the video competition act:

(a) "Cable service" is defined as set forth in 47 U.S.C. § 522(6).

(b) "Cable operator" is defined as set forth in 47 U.S.C. § 522(5).

(c) "Cable system" is defined as set forth in 47 U.S.C. § 522(7).

(d) "Competitive video service provider" means an entity providing video service that is not franchised as a cable operator in the state of Kansas as of the effective date of this act and is not an affiliate, successor or assign of such cable operator.

(e) "Franchise" means an initial authorization, or renewal of an authorization, issued by a municipality, regardless of whether the authorization is designed as a franchise, permit, license, resolution, contract, certificate, agreement or otherwise, that authorizes the construction and operation of a cable system.

(f) "Municipality" means a city or county.

(g) "Video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station, as set forth in 47 U.S.C. § 522(20).

(h) "Video service" means video programming services provided through wireline facilities located at least in part in the public rights-of-way without regard to delivery technology, including internet protocol technology. This definition does not include any video programming provided by a commercial mobile service provider defined in 47 U.S.C. § 332(d).

(i) "Video service authorization" means the right of a video service provider to offer video programming to any subscribers anywhere in the state of Kansas.

(j) "Video service provider" means a cable operator or a competitive video service provider.

(k) "Video service provider fee" means the fee imposed upon video service providers pursuant to section 4 of this act.

New Sec. 3. (a) An entity or person seeking to provide cable service or video service in this state on or after July 1, 2006, shall file an application for a state-issued video service authorization with the state corporation commission as required by this section. The state corporation commission shall promulgate regulations to govern the state-issued video service authorization application process. The state, through the state corporation commission, shall issue a video service authorization permitting a video service provider to provide video service in the state, or amend a video service authorization previously issued, within 30 calendar days after receipt of a completed affidavit submitted by the video service applicant and signed by an officer or general partner of the applicant affirming:

(1) The location of the applicant's principal place of business and the names of the applicant's principal executive officers;

(2) that the applicant has filed or will timely file with the federal communications commission all forms required by that agency in advance of offering video service in this state;

(3) that the applicant agrees to comply with all applicable federal and state statutes and regulations;

(4) that the applicant agrees to comply with all lawful and applicable municipal regulations regarding the use and occupation of public rights-of-way in the delivery of the video service, including the police powers of the municipalities in which the service is delivered;

(5) the description of the service area footprint to be served within the state of Kansas, including any municipalities or parts thereof, and which may include certain designations of unincorporated areas, which description shall be updated by the applicant prior to the expansion of video service to a previously undesignated service area and, upon such expansion, notice to the state corporation commission of the service area to be served by the applicant; including:

(A) The period of time it shall take applicant to become capable of providing video programming to all households in the applicant's service

area footprint, which may not exceed five years from the date the authorization, or amended authorization, is issued; and

(B) a general description of the type or types of technologies the applicant will use to provide video programming to all households in its service area footprint, which may include wireline, wireless, satellite or any other alternative technology.

(b) The certificate of video service authorization issued by the state corporation commission shall contain:

(1) A grant of authority to provide video service as requested in the application;

(2) a statement that the grant of authority is subject to lawful operation of the video service by the applicant or its successor in interest.

(c) The certificate of video service authorization issued by the state corporation commission is fully transferable to any successor in interest to the applicant to which it is initially granted. A notice of transfer shall be filed with the state corporation commission and any relevant municipalities within 30 business days of the completion of such transfer.

(d) The certificate of video service authorization issued by the state corporation commission may be terminated by the video service provider by submitting notice to the state corporation commission.

(e) To the extent required by applicable law, any video service authorization granted by the state through the state corporation commission shall constitute a "franchise" for purposes of 47 U.S.C. § 541(b)(1). To the extent required for purposes of 47 U.S.C. §§ 521-561, only the state of Kansas shall constitute the exclusive "franchising authority" for video service providers in the state of Kansas.

(f) The holder of a state-issued video service authorization shall not be required to comply with any mandatory facility build-out provisions nor provide video service to any customer using any specific technology. Additionally, no municipality of the state of Kansas may:

(1) Require a video service provider to obtain a separate franchise to provide video service;

(2) impose any fee, license or gross receipts tax on video service providers, other than the fee specified in subsections (b) through (e) of section 4, and amendments thereto;

(3) impose any provision regulating rates charged by video service providers; or

(4) impose any other franchise or service requirements or conditions on video service providers, except that a video service provider must submit the agreement specified in subsection (a) of section 4, and amendments thereto.

(g) K.S.A. 12-2006 through 12-2011, and amendments thereto, shall not apply to video service providers.

(h) Not later than 120 days after a request by a municipality, the holder of a state-issued video service authorization shall provide the municipality with capacity over its video service to allow public, educational and governmental (PEG) access channels for noncommercial programming, according to the following:

(1) A video service provider shall not be required to provide more than two PEG access channels;

(2) the operation of any PEG access channel provided pursuant to this section shall be the responsibility of the municipality receiving the benefit of such channel, and the holder of a state-issued video service authorization bears only the responsibility for the transmission of such channel; and

(3) the municipality must ensure that all transmissions, content, or programming to be transmitted over a channel or facility by a holder of a state-issued video service authorization are provided or submitted to such video service provider in a manner or form that is capable of being accepted and transmitted by a provider, without requirement for additional alteration or change in the content by the provider, over the particular network of the video service provider, which is compatible with the technology or protocol utilized by the video service provider to deliver video services;

(i) in order to alert customers to any public safety emergencies, a video service provider shall offer the concurrent rebroadcast of local television broadcast channels, or utilize another economically and technically feasible process for providing an appropriate message through the

provider's video service in the event of a public safety emergency issued over the emergency broadcast system.

(j) (1) Valid cable franchises in effect prior to July 1, 2006, shall remain in effect subject to this section. Nothing in this act is intended to abrogate, nullify or adversely affect in any way any franchise or other contractual rights, duties and obligations existing and incurred by a cable operator or competitive video service provider before the enactment of this act. A cable operator providing video service over a cable system pursuant to a franchise issued by a municipality in effect on July 1, 2006, shall comply with the terms and conditions of such franchise until such franchise expires, is terminated pursuant to its terms or until the franchise is modified as provided in this section.

(2) Whenever two or more video service providers are providing service within the jurisdiction of a municipality, a cable operator with an existing municipally issued franchise agreement may request that the municipality modify the terms of the existing franchise agreement to conform to the terms and conditions of a state-issued video service authorization. The cable operator requesting a modification shall identify in writing the terms and conditions of its existing franchise that are materially different from the state-issued video service authorization, whether such differences impose greater or lesser burdens on the cable operator. Upon receipt of such request from a cable operator, the cable operator and the municipality shall negotiate the franchise modification terms in good faith for a period of 60 days. If within 60 days, the municipality and the franchised cable operator cannot reach agreeable terms, the cable operator may file a modification request pursuant to paragraph (3).

(3) Whenever two or more video service providers are providing service within the jurisdiction of a municipality, a cable operator may seek a modification of its existing franchise terms and conditions to conform to the terms and conditions of a state-issued video service authorization pursuant to 47 U.S.C. § 545; provided, however, that a municipality's review of such request shall conform to this section. In its application for modification, a franchised cable operator shall identify the terms and conditions of its municipally issued franchise that are materially different from the terms and conditions of the state-issued video service authorization, whether such differences impose greater or lesser burdens on the cable operator. The municipality shall grant the modification request within 120 days for any provisions where there are material differences between the existing franchise and the state-issued video service authorization. No provisions shall be exempt. A cable operator that is denied a modification request pursuant to this paragraph may appeal the denial to a court of competent jurisdiction which shall perform a de novo review of the municipality's denial consistent with this section.

(4) Nothing in this act shall preclude a cable operator with a valid municipally issued franchise from seeking enforcement of franchise provisions that require the equal treatment of competitive video service providers and cable operators within a municipality, but only to the extent such cable franchise provisions may be enforced to reform or modify such existing cable franchise. For purposes of interpreting such cable franchise provisions, a state-issued video service authorization shall be considered equivalent to a municipally issued franchise; provided, however, that the enforcement of such cable franchise provisions shall not affect the state-issued video service authorization in any way.

(k) Upon 90 days notice, a municipality may require a video service provider to comply with customer service requirements consistent with 47 C.F.R. § 76.309(c) for its video service with such requirements to be applicable to all video services and video service providers on a competitively neutral basis.

(l) A video service provider may not deny access to service to any group of potential residential subscribers because of the income of the residents in the local area in which such group resides.

(m) Within 180 days of providing video service in a municipality, the video service provider shall implement a process for receiving requests for the extension of video service to customers that reside in such municipality, but for which video service is not yet available from the provider to the residences of the requesting customers. The video service provider shall provide information regarding this request process to the municipality, who may forward such requests to the video service provider

on behalf of potential customers. Within 30 days of receipt, a video service provider shall respond to such requests as it deems appropriate and may provide information to the requesting customer about its video products and services and any potential timelines for the extension of video service to the customers area.

(n) A video service provider shall implement an informal process for handling municipality or customer inquiries, billing issues, service issues and other complaints. In the event an issue is not resolved through this informal process, a municipality may request a confidential, non-binding mediation with the video service provider, with the costs of such mediation to be shared equally between the municipality and provider. Should a video service provider be found by a court of competent jurisdiction to be in noncompliance with the requirements of this act, the court shall order the video service provider, within a specified reasonable period of time, to cure such noncompliance. Failure to comply shall subject the holder of the state-issued franchise of franchise authority to penalties as the court shall reasonably impose, up to and including revocation of the state-issued video service authorization. A municipality within which the video service provider offers video service may be an appropriate party in any such litigation.

New Sec. 4. (a) A video service provider shall provide notice to each municipality with jurisdiction in any locality at least 30 calendar days before providing video service in the municipality's jurisdiction. Within 30 days of the time notice is delivered to the municipality, the video service provider shall execute an agreement substantially similar to the following, which shall be filed with the city or county clerk and shall be effective immediately:

"[Video Service Provider] was granted authorization by the state of Kansas to provide video service in [Municipality] on [date] and hereby executes this agreement with [Municipality]. [Video Service Provider] will begin providing video service in [Municipality] on or after [date]. [Video Service Provider] may be contacted by the [Municipality] at the following telephone number _____. [Video Service Provider] may be contacted by customers at the following telephone number _____. [Video Service Provider] agrees to update this contact information with [Municipality] within 15 calendar days in the event that such contact information changes. [Video Service Provider] acknowledges and agrees to comply with [Municipality's] local right of way ordinance to the extent the ordinance is applicable to [Video Service Provider] and not contrary to state and federal laws and regulations. [Video Service Provider] hereby reserves the right to challenge the lawfulness or applicability of such ordinance to [Video Service Provider]. By entering into this agreement, neither the municipality's nor [Video Service Provider's] present or future legal rights, positions, claims, assertions or arguments before any administrative agency or court of law are in any way prejudiced or waived. By entering into the agreement, neither the municipality nor [Video Service Provider] waive any rights, but instead expressly reserve any and all rights, remedies and arguments the municipality or [Video Service Provider] may have at law or equity, without limitation, to argue, assert and/or take any position as to the legality or appropriateness of any present or future laws, ordinances and/or rulings."

(b) In any locality in which a video service provider offers video service, the video service provider shall calculate and pay the video service provider fee to the municipality with jurisdiction in that locality upon the municipality's written request. If the municipality makes such a request, the video service provider fee shall be due on a quarterly basis and shall be calculated as a percentage of gross revenues, as defined herein. Notwithstanding the date the municipality makes such a request, no video service provider fee shall be applicable until the first day of a calendar month that is at least 30 days after written notice of the levy is submitted by the municipality to a video service provider. The municipality may not demand the use of any other calculation method. Any video service provider fee shall be remitted to the municipality by the video service provider not later than 45 days after the end of the quarter.

(c) The percentage to be applied against gross revenues pursuant to subsection (b) shall be set by the municipality and identified in its written request, but may in no event exceed 5%.

(d) Gross revenues are limited to amounts billed to and collected from video service subscribers for the following:

(1) Recurring charges for video service;

(2) event-based charges for video service, including but not limited to pay-per-view and video-on-demand charges;

(3) rental of set top boxes and other video service equipment;

(4) service charges related to the provision of video service, including, but not limited to, activation, installation, repair and maintenance charges; and

(5) administrative charges related to the provision of video service, including, but not limited to, service order and service termination charges.

(e) Gross revenues do not include:

(1) Uncollectible fees, provided that all or part of uncollectible fees which is written off as bad debt but subsequently collected, less expenses of collection, shall be included in gross revenues in the period collected;

(2) late payment fees;

(3) amounts billed to video service subscribers to recover taxes, fees or surcharges imposed upon video service subscribers in connection with the provision of video service, including the video service provider fee authorized by this section; or

(4) charges, other than those described in subsection (d), that are aggregated or bundled with amounts billed to video service subscribers.

(f) At the request of a municipality, no more than once per year, the municipality may perform a reasonable audit of the video service provider's calculation of the video service provider fee.

(g) Any video service provider may identify and collect the amount of the video service provider fee as a separate line item on the regular bill of each subscriber. To the extent a video service provider incurs any costs in providing capacity for retransmitting community programming as may be required in subsection (h) of section 3, and amendments thereto, the provider may also recover these costs from customers, but may not deduct such costs from the video service provider fee due to a municipality under this section.

New Sec. 5. (a) The provisions of this act are intended to be consistent with the federal cable act, 47 U.S.C. § 521 et seq.

(b) Nothing in this act shall be interpreted to prevent a competitive video service provider, a cable operator or a municipality from seeking clarification of its rights and obligations under federal law or to exercise any right or authority under federal or state law.

New Sec. 6. (a) The state corporation commission shall:

(1) Assess the costs of any proceeding before the commission pursuant to this act against the parties to the proceeding; and

(2) establish and collect fees from entities and persons filing applications with the state corporation commission for state-issued video service authorizations, which fees shall be in amounts sufficient to pay the costs of administration of this act, including costs of personnel.

(b) The state corporation commission shall remit all moneys received by the commission pursuant to this section to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of the remittance, the state treasurer shall deposit the entire amount in the state treasury and credit it to the public service regulation fund.

Sec. 7. K.S.A. 2005 Supp. 17-1902 is hereby amended to read as follows: 17-1902. (a) (1) "Public right-of-way" means only the area of real property in which the city 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. The term does not include the airwaves above a right-of-way with regard to wireless telecommunications or other nonwire telecommunications or broadcast service, easements obtained by utilities or private easements in platted subdivisions or tracts.

(2) "Provider" ~~shall mean~~ *means* a local exchange carrier as defined in subsection (h) of K.S.A. 66-1,187, and amendments thereto, or a telecommunications carrier as defined in subsection (m) of K.S.A. 66-1,187,

and amendments thereto*, or a video service provider as defined in section 2, and amendments thereto*.

(3) "Telecommunications services" means providing the means of transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(4) "Competitive infrastructure provider" means an entity which leases, sells or otherwise conveys facilities located in the right-of-way, or the capacity or bandwidth of such facilities for use in the provision of telecommunications services, internet services or other intrastate and interstate traffic, but does not itself provide services directly to end users within the corporate limits of the city.

(b) Any provider shall have the right pursuant to this act to construct, maintain and operate poles, conduit, cable, switches and related appurtenances and facilities along, across, upon and under any public right-of-way in this state. Such appurtenances and facilities shall be so constructed and maintained as not to obstruct or hinder the usual travel or public safety on such public ways or obstruct the legal use by other utilities.

(c) Nothing in this act shall be interpreted as granting a provider the authority to construct, maintain or operate any facility or related appurtenance on property owned by a city outside of the public right-of-way.

(d) The authority of a 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 city. A city 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. Nothing herein shall be construed to limit the authority of cities to require a competitive infrastructure provider to enter into a contract franchise ordinance.

(e) The city shall have the authority 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 the authority is exercised in a competitively neutral manner and is not unreasonable or discriminatory. A reasonable public interest shall include the following:

(1) The prohibition is based upon a recommendation of the city engineer, is related to public health, safety and welfare and is nondiscriminatory among providers, including incumbent providers;

(2) the provider has rejected a reasonable, competitively neutral and nondiscriminatory justification offered by the city for requiring an alternate method or alternate route that will result in neither unreasonable additional installation expense nor a diminution of service quality;

(3) the city reasonably determines, after affording the provider reasonable notice and an opportunity to be heard, that a denial is necessary to protect the public health and safety and is imposed on a competitively neutral and nondiscriminatory basis; or

(4) the specific portion of the public right-of-way for which the provider seeks use and occupancy is environmentally sensitive as defined by state or federal law or lies within a previously designated historic district as defined by local, state or federal law.

(f) A provider's request to use or occupy a specific portion of the public right-of-way shall not be denied without reasonable notice and an opportunity for a public hearing before the city governing body. A city governing body's denial of a provider's request to use or occupy a specific portion of the public right-of-way may be appealed to a district court.

(g) A provider shall comply with all laws and rules and regulations governing the use of public right-of-way.

(h) A city may not impose the following regulations on providers:

(1) Requirements that particular business offices or other telecommunications facilities be located in the city;

(2) requirements for filing applications, reports and documents that are not reasonably related to the use of a public right-of-way or this act;

(3) requirements for city approval of transfers of ownership or control of the business or assets of a provider's business, except that a city may require that such entity maintain current point of contact information and provide notice of a transfer within a reasonable time; and

(4) requirements concerning the provisioning of or quality of cus-

tomer services, facilities, equipment or goods in-kind for use by the city, political subdivision or any other provider or public utility.

(i) Unless otherwise required by state law, in the exercise of its lawful regulatory authority, a city shall promptly, and in no event more than 30 days, with respect to facilities in the public right-of-way, process each valid and administratively complete application of a provider for any permit, license or consent to excavate, set poles, locate lines, construct facilities, make repairs, effect traffic flow, obtain zoning or subdivision regulation approvals, or for other similar approvals, and shall make reasonable effort not to unreasonably delay or burden that provider in the timely conduct of its business. The city shall use its best reasonable efforts to assist the provider in obtaining all such permits, licenses and other consents in an expeditious and timely manner.

(j) If there is an emergency necessitating response work or repair, a provider may begin that repair or emergency response work or take any action required under the circumstances, provided that the ~~telecommunications~~ provider notifies the affected city promptly after beginning the work and timely thereafter meets any permit or other requirement had there not been such an emergency.

(k) A city may require a 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 its functional equivalence before the damage pursuant to the reasonable requirements and specifications of the city. If the provider fails to make the repairs required by the city, the city may effect those repairs and charge the provider the cost of those repairs. If a city incurs damages as a result of a violation of this subsection, then the city shall have a cause of action against a provider for violation of this subsection, and may recover its damages, including reasonable attorney fees, if the provider is found liable by a court of competent jurisdiction.

(l) If requested by a city, in order to accomplish construction and maintenance activities directly related to improvements for the health, safety and welfare of the public, a ~~telecommunications company promptly shall~~ *provider shall promptly* remove its facilities from the public right-of-way or shall relocate or adjust its facilities within the public right-of-way at no cost to the political subdivision. Such relocation or adjustment shall be completed as soon as reasonably possible within the time set forth in any request by the city for such relocation or adjustment. Any damages suffered by the city or its contractors as a result of such provider's failure to timely relocate or adjust its facilities shall be borne by such provider.

(m) No city shall create, enact or erect any unreasonable condition, requirement or barrier for entry into or use of the public rights-of-way by a provider.

(n) A city may assess any of the following fees against a provider, for use and occupancy of the public right-of-way, provided that such fees reimburse the city for its reasonable, actual and verifiable costs of managing the city right-of-way, and are imposed on all such providers in a nondiscriminatory and competitively neutral manner:

(1) A permit fee in connection with issuing each construction permit to set fixtures in the public right-of-way within that city as provided in K.S.A. 17-1901, and amendments thereto, to compensate the city for issuing, processing and verifying the permit application;

(2) an excavation fee for each street or pavement cut to recover the costs associated with construction and repair activity of the provider, their assigns, contractors and/or subcontractors with the exception of construction and repair activity required pursuant to subsection (l) of this act related to construction and maintenance activities directly related to improvements for the health, safety and welfare of the public; provided, however, imposition of such excavation fee must be based upon a regional specific or other appropriate study establishing the basis for such costs which takes into account the life of the city street prior to the construction or repair activity and the remaining life of the city street. Such excavation fee is expressly limited to activity that results in an actual street or pavement cut;

(3) inspection fees to recover all reasonable costs associated with city inspection of the work of the ~~telecommunications~~ provider in the right-of-way;

(4) repair and restoration costs associated with repairing and restoring the public right-of-way because of damage caused by the provider, its assigns, contractors, and/or subcontractors in the right-of-way; and

(5) a performance bond, in a form acceptable to the city, from a surety licensed to conduct surety business in the state of Kansas, insuring appropriate and timely performance in the construction and maintenance of facilities located in the public right-of-way.

(o) A city may not assess any additional fees against providers for use or occupancy of the public right-of-way other than those specified in subsection (n).

(p) This act may not be construed to affect any valid taxation of a ~~telecommunications~~ provider's facilities or services.

(q) Providers shall indemnify and hold the city and its officers and employees harmless against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees (including 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 (including 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 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 subsection does not apply to any liability resulting from the negligence of the city, its officers, employees, contractors or subcontractors. If a provider and the city are found jointly liable by a court of competent jurisdiction, liability shall be apportioned comparatively in accordance with the laws of this state without, however, waiving any governmental immunity available to the city under state law and without waiving any defenses of the parties under state or federal law. This section is solely for the benefit of the city and provider and does not create or grant any rights, contractual or otherwise, to any other person or entity.

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

(s) Nothing contained in K.S.A. 17-1902, and amendments thereto, is intended to affect the validity of any franchise fees collected pursuant to state law or a city's home rule authority.

(t) Any ordinance enacted prior to the effective date of this act governing the use and occupancy of the public right-of-way by a provider shall not conflict with the provisions of this act.

New Sec. 8. If any word, phrase, sentence or provision of this act, sections 1 through 6 and K.S.A. 2005 Supp. 17-1902, and amendments thereto, or the application thereof to any person or circumstance is determined to be invalid, such invalidity shall not affect the other provisions or applications of this act and they shall be given effect without the invalid provisions or applications, and to this end the provisions of this act are declared to be severable.

Sec. 9. K.S.A. 2005 Supp. 17-1902 is hereby repealed.

Sec. 10. This act shall take effect and be in force from and after its publication in the statute book.

I hereby certify that the above BILL originated in the SENATE, and passed that body

_____

SENATE adopted
Conference Committee Report _____

_____
President of the Senate.

_____
Secretary of the Senate.

Passed the HOUSE
as amended _____

HOUSE adopted
Conference Committee Report _____

_____
Speaker of the House.

_____
Chief Clerk of the House.

APPROVED _____

_____
Governor.