

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Senator Karin Brownlee at 8:30 a.m. on February 20, 2002 in Room 123-S of the Capitol.

All members were present except:

Committee staff present:

April Holman, Legislative Research
Debra Hollon, Legislative Research
Norman Furse, Revisor of Statues
Sherman Parks, Revisor of Statues
Lea Gerard, Committee Secretary

Conferees appearing before the committee:

Rachel Lipman Reiber, Vice President of
Regulatory and Governmental Affairs
Everest Connections
Bill Yanek, Director Governmental Relations,
Kansas Association of Realtors

Others attending:

See attached list

Hearings on **SB 605**--Act concerning certain reports to the legislature and committees.

Chairperson Brownlee briefly explained **SB 605** would eliminate paper reports to the New Economy and Senate Commerce Committees and would be published on the internet. Committee members would be provided with the uniform resource locator (URL) of where the report can be located on the internet.

Senator Steineger moved, seconded by Senator Jordan that **SB 605** be amended on Page 2 Line 7 to strike "~~economic development~~" and insert the words "*new economy*". Motion carried.

There being no conferees wishing to testify, the hearing on **SB 605** was closed.

Hearings on **SB 593**--Landlord agreements with telecommunication providers.

In accordance with KSA 75-3715a, the fiscal note for **SB 593** was submitted to committee members.

Rachael Lipman Reiber, Vice President of Regulatory and Governmental Affairs, Everest Connections, testified in support of **SB 593** (Attachment 1). Everest has not been successful in their ability to serve all apartment complexes. In Lenexa, Kansas alone, there are 18,000 residential units and Everest has been able to build to 12,000 of those units. The remaining are apartment complexes that Everest is unable to serve because owners have signed an exclusive perpetual easement agreement with incumbent providers. Many of the owners indicate they would like to do business with Everest but fear breach of contract if they permit Everest to provide that service. The Cable Reform Act of 1992 and Telecommunications Act of 1996 was to give people choice so they would be able to select services, lower price, and better customer service. Everest feels that apartment residents should not be deprived of the benefits of competition.

The committee questioned if the easement meant taking the wire to the apartment or using the wire that is already placed. Rachael explained that Everest builds their plant in from the street to the utility closet located in the apartment complex and this would be the easement. The FCC has some rules pertaining to the inside wiring of a building and in many cases an apartment was wired by the provider in return for the exclusive right to provide service.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON COMMERCE at on February 20, 2002 in Room 123-S of the Capitol.

The committee questioned Rachael Reiber regarding the contractual agreement with a landlord and how that issue would be resolved. Rachael explained with this legislation it would allow a landlord to break out of a contract or modify portions of the contract that relate to restrictions.

Bill Yanek, Director of Government Relations for the Kansas Association of Realtors testified in opposition to **SB 593** (Attachment 2) stating that the bill raises the "Forced Access" issue. Forced access laws look for government-mandated access so that telecommunication providers can install their systems in private buildings without the consent of the owner.

Sam Maropis, Associate Director, Product Marketing, SBC presented written testimony in opposition to **SB 593** (Attachment 3).

There being no further conferees wishing to testify, the hearings on **SB 593** was closed.

Chairperson Brownlee asked Sherman Parks, Revisor of Statues to comment on the issue of previous contractual agreements between two parties and then a third party wanting in essence to affect that agreement. Sherman Parks stated traditionally you would have a contractual agreement between the two parties and you would need some form of legislation to allow them to break that contact. The issue raised is if there would be a breach of contract. Most of these contracts would be on an ongoing renewal type basis unless there is a specific term or vehicle to get out of the contract.

The meeting was adjourned at 9:30 a.m.

The next meeting is scheduled for February 21, 2002 at 8:30 a.m.

Before the Senate Commerce Committee

Testimony of Rachel Lipman Reiber
Vice President of Regulatory and Governmental Affairs
Everest Connections

February 20, 2002

Good Morning Chairman Brownlee and Members of the Committee,

I am Rachel Lipman Reiber, Vice President of Regulatory and Government Affairs for Everest Midwest Licensee, LLC dba Everest Connections. Everest is a broadband service provider, whose majority owner is UtiliCorp United, Inc. Everest provides dial tone, 911 connectivity and a full complement of CLASS features, such as caller ID, call waiting, call forwarding, etc. In addition Everest offers 300 analog and digital cable channels and high speed Internet service at up to 3.0 Mbps downstream with all of these services delivered over a hybrid fiber coaxial architecture, which we extend to each home. Utilicorp also owns and operates Unite, a broadband service provider in Kearney, Missouri. Everest and Unite appear here today to testify in favor of S.B. 593.

Background

Everest turned up its first customers on January 25, 2001, in Lenexa, Kansas. We have received a great response to our service. In one year of operation, we have been able to attract one customer for every three single-family dwellings we have passed with our hybrid fiber-coaxial plant. People are excited about having a choice of providers for their telecommunications and cable services and have responded well to the prospect of having lower prices, a single bill and personalized customer service. In December 2001, Everest turned up its first customers on the Missouri side of the state line. We have secured cable franchises in Overland Park, Shawnee, Merriam, Mission and Westwood as well as Kansas City, Missouri, and Raytown. It is Everest's plan to continue our build out in the Kansas City area on both sides of the state line.

In Kearney, Unite also offers a full range of voice, data and video services using VDSL technology. To date Unite has been able to attract more than 60 percent of the customer base, but has had mixed success in entering multiple dwelling units.

Neither Everest nor Unite's entry into the market as a competitive local exchange carrier and cable company would have been possible without the Cable Act of 1992 ("Cable Act") and the Telecommunications Act of 1996. The desired result of both of these laws was to promote competition.

Senate Commerce Committee
Feb. 20, 2002
Attachment 1-1

Everest considers its early capture of 30% of the addressable market to be very encouraging, however, without being able to obtain customers from the entire market, Everest is at a severe disadvantage. In Lenexa, Everest has built the entire city with the exception of multiple-dwelling units that won't allow entry, and has 12,000 passings. Its competitor, Time Warner Cable, on the other hand, has 18,150 passings from which to market, as they have managed to secure exclusive agreements with most owners of apartment complexes. This puts Everest at a competitive economic disadvantage. Everest must still make the heavy capital investment of building the infrastructure, but doesn't enjoy the benefits of scale.

The Cable Act and FCC Rules Implementing the Cable Act

The Cable Act¹ places strict requirements on everyone who holds a franchise and requires that a franchise holder serve all residents regardless of income. In Overland Park, for example, the city's cable code requires that cable companies serve ALL single and multifamily dwelling units within a density of 10 dwellings per one fourth mile.

¹ 47 USC 541 (a) Authority to award franchises; public rights-of-way and easements; equal access to services; time for provision of service; assurances

- (1) A franchising authority may award, in accordance with the provisions of this subchapter, one or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 555 of this title for failure to comply with this subsection;
- (2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure—
 - (A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;
 - (B) that the cost of the installation, construction, operation or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and
 - (C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.
- (3) In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which the group resides.
- (4) In awarding a franchise, the franchising authority
 - (A) shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;
 - (B) may require adequate assurance that the cable operator will provide adequate public, educational and governmental access, channel capacity, facilities, or financial support;
 - (C) may require adequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service.

Does this legislation run the risk of being a constitutional “taking”?

In 1982, the United States Supreme Court, in *Loretto v. Telepromoter Manhattan CATV Corp.*² et al., held that a minor but permanent physical occupation of an owner's property authorized by government was a “taking.” The United States Supreme Court concluded that the amount of compensation was a matter for the state court to determine on remand. Hence, with the provision for compensation contained in section 3 of the bill, and with provision of a court-appointed arbitrator if the parties cannot agree upon an arbitrator, Everest believes that any questions should be put to rest concerning the issue of whether S.B. 593 results in an unconstitutional taking.

Does this legislation represent interference with private contractual rights?

It is a well-established principle that contractual rights may be abrogated if it is determined that a contract is void as against public policy³. Many, if not most of the contracts we have seen between landlords and cable providers have been entered into since 1996. By that time, the rules of the road were quite clear. Competition for telecommunications and cable service was the national policy. Yet incumbent providers still attempted to “lock up” multi-tenant properties to exclude competition. In other cases Everest has seen copies of easement agreements between landlords and incumbent cable providers that were executed in 1997; yet these easements were not recorded at the Register of Deeds until competition was imminent. This legislation may be viewed as state implementation of what has been the national policy for nearly a decade.

This is a consumer issue

In the areas where Everest has begun to provide service, the incumbent provider has dropped its rates dramatically and the incumbent provider has been more attentive to improving services as opposed to increasing rates. Attached to this testimony is a price list of Everest's services along with a comparison of the incumbent's regular prices and the discounted prices offered by the incumbent when they face competition.

² 458 U.S. 419; 102 S. Ct. 3164; 73 L Ed 2d 868 (1982).

³ *Peck v. Horst*, 175 Kan. 479, 264 P.2d 888 (1953). *Okerberg v. Crable*, 185 Kan. 211, 341 P.2d 966 (1959).

Conclusion

What we are asking for is help to remove a barrier to competition. Everyone wants competition. It's the American way. May the best person win. But for competition to exist, all players must be allowed to participate. Everest cannot be expected to compete long-term if we make the necessary capital investment to build-out a market, and then are locked out of up to 28 percent of that same market.

Everest is willing to compensate property owners in a manner that is commensurate with what they have been receiving from the incumbent providers.

Price List of Everest Competitor

Services	Price In Area Where Everest Is Serving Customers	Regular Price
Standard cable service (69+ channels), Digital Box, Tier OR Canales en Espanol, HBO, Max, Showtime	\$39.95/month	\$74.34/month
Standard cable service (69+ channels), 3 Digital Boxes, Tier or Canales en Espanol, ALL Premiums	\$59.95/month	\$103.34/month
Standard cable service (69+ channels), Digital Box, Tier OR Canales en Espanol, HBO, Max, Showtime, RR	\$79.95/month	\$119.29/month
Standard cable service (69+ channels), 3 Digital Boxes, Tier or Canales en Espanol, All Premiums, RR	\$99.95/month	\$129.95/month
Standard cable service (69+ channels)	\$21.45/month	\$34.89/month
Standard cable service (69+ channels), Digital Box, Tier or Canales en Espanol	\$29.95/month	\$49.39/month
Standard cable service (69+ channels), Digital Box, Tier, or Canales en Espanol, HBO	\$35.95/month	\$59.34/month

Price List of Everest

Local phone service, standard cable service (70+ channels);45 Music Channels; Digital Cable Service (40+ digital channels)	\$49.95/month
Local phone service, standard cable service (70+ channels); 45 Music Channels; Digital Cable Service (40+ channels); One Premium Channel Package (HBO, Cinemax, STARZ/Encore, or Showtime/TMC); and 256 K downstream Internet,	\$76.95/month
Local phone service, Top 110 Optional Telephone Features (Caller ID, Call Waiting, Three Way Calling, etc), Basic Voice Mail; Standard cable service (70+ channels), 45 Music Channels; Digital Cable Service (40+ channels), Two Premium channel packages (HBO, Cinemax, STARZ/Encore, or Showtime/TMC) and 1.5 Mbps downstream Internet	\$99.95/month
Local phone service, Top 110 Optional Telephone Features (Caller ID, Call Waiting, Three Way Calling, etc), Voice Mail; Standard cable service (70+ channels), 45 Music Channels; Digital Cable Service (40+ channels), All Premium channel packages (HBO, Cinemax, STARZ/Encore, or Showtime/TMC) and 3.0 Mbps downstream Internet	\$129.95/month



TO: SENATE COMMERCE COMMITTEE

FROM: BILL YANEK, KAR DIRECTOR OF GOVERNMENTAL RELATIONS

DATE: FEBRUARY 20, 2002

SUBJECT: SB 593 – Telecommunication services relating to agreements with telecommunications providers and landlords

Thank you for the opportunity to present written testimony regarding Senate Bill 593. The Kansas Association of REALTORS® opposes the concepts in this proposal.

Senate Bill 593 raises the “Forced Access” Issue. Forced access proposals seek government-mandated access for some telecommunications providers to install their systems in private buildings without the consent of the owner. Senate Bill 593 proposes a variation on the “Forced Access” issue by mandating a cumbersome and endless review of negotiated agreements between cable/telecommunications providers and landlords without the consent of the property owner.

During the 1999 and 2000 legislative sessions, the Kansas Cable Telecommunications Association pursued the “Forced Access” Issue through cable industry crafted legislation designed to block multi-family property owners from earning revenue from cable or satellite providers. This legislation proposed to prevent landlords from receiving any sort of commission or rebate from cable or satellite television providers for installing the systems in their rental units. Additionally, it attempted to prevent a property owner from recouping from their tenants the costs of installation, repair, maintenance or monthly charges. It also would have prevented a property owner from charging a tenant who utilized the owner’s cable or satellite system more rent than a tenant who did not. The cable industry pursued this effort even though a 1982 United States Supreme Court case (Loretto v. Teleprompter Manhattan CATV Corp.) ruled that a New York law similar to the bill was unconstitutional. The legislation (Senate Bill 54) was ultimately tabled.

Since 2000, both the FCC and Massachusetts state courts have studied the “Forced Access” Issue. In August of 2001, a Massachusetts state court upheld the Supreme Court’s Loretto decision by holding: “[p]erhaps the most serious invasion of an owner’s property interests...occurs in the circumstances in which a third party is authorized to use and obtain profits from the landowners property without just compensation...”



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Senate Commerce Committee
Feb. 20, 2002
Attachment 2-1

On October 25, 2001, the FCC released a much-anticipated written order on building access. However, the Order did not take steps to directly regulate access and use of private property of building owners, and declined to issue extensive regulations governing the way property owners provide use of their buildings.

It seems that as a result of court and regulatory decisions that do not support the cable industry's "Forced Access" efforts, they are now targeting the agreements that landlords negotiate with cable or telecommunications providers.

An especially troublesome aspect of Senate Bill 593 is Section (5) (d). Referring to negotiated agreements between cable / telecommunications providers that section states:

"A landlord shall also allow a new provider to request the terms and conditions of an agreement that exists between a landlord and a provider...If a provider cannot agree on an appropriate rate of compensation, an arbitrator shall be appointed to determine the appropriate level of compensation due the landlord."

However, the bill places no limits upon the number and scope of these "terms and conditions" requests. We believe that this aspect of the bill could result in endless inquiries or arbitration for the landlord defending his or her right to negotiate agreements with cable / telecommunication providers.

Lastly, although "Forced Access" proposals purport to increase competition, we believe that competition in telecommunication service exists in today's marketplace. Landlords are especially sensitive to this environment. If tenants are not receiving the telecommunication options that they want, tenants will move elsewhere.

Thank you for your consideration of our concerns.

Senate Commerce Committee
SB 593
February 20, 2002

Testimony of Sam Maropis
Associate Director, Product Marketing, SBC Southwestern Bell

Thank you, Chairman Brownlee and members of the Committee. I am submitting this written testimony today to express several concerns about SB 593 on behalf of SBC Southwestern Bell.

Southwestern Bell strongly supports the right of consumers to choose their telecommunications provider. However, SB 593 severely interferes with the rights of property owners to choose what marketing relationships they may agree to enter into with providers. While property owners should not exclude any carrier from providing telecommunications services to customers, no carrier should be able to force a property owner to market services on behalf of the carrier.

As background, in the telecommunications industry, carriers will often approach property owners and enter into a relationship for the benefit of the owner and the provider to market telecommunications services. These agreements do not preclude other carriers from providing services. These marketing relationships between the owner and the provider serve a real need in Kansas, and often assist the owner in upgrading the wire and equipment on the property used to serve customers and bring innovative services to the marketplace. SB 593 would work to undermine these agreements to the detriment of consumers and property owners.

In summary, SB 593:

- ✓ Is unnecessary, as many providers of multiple technologies have entered into marketing agreements with property owners, demonstrating that no company has an advantage.
- ✓ Undermines the competitive bidding process, as any company may demand access to confidential, privately bid rates and terms, even after losing the bid to the most competitive provider. This will give an incentive to companies to bid high (or not at all) on less than favorable terms, knowing that the provider may match the best bid later, even after a contract is signed (page 4, lines 8-12).
- ✓ Interferes with a property owner's business, forcing the owner to market services for a provider it does not know or trust (page 4, lines 8-12), and subjecting owners to court battles if a provider attempts to force an owner to market the provider's service (page 4, lines 12-19).

In Kansas today, providers aggressively compete against one another for the opportunity to provide marketing support to property owners, and owners look to the providers for help and assistance in offering services to tenants. If a tenant chooses to request information on the services available, then the owner should have the right to choose what services it will market.

I encourage you to closely examine SB 593.

Thank you.

Senate Commerce Committee
Feb 20, 2002
Attachment 3.1