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SB 144 – Satellite and Streaming Preemption
Written Only
Opponent

FROM: Michael Koss – Deputy City Attorney, City of Overland Park
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TO:
Senate Utilities Committee

Thank you for allowing the City of Overland Park to submit testimony in opposition to SB 144. The City opposes any legislation that restricts or repeals the current franchise authority for cities. The City specifically opposes SB 144 because it creates: (1) an unintended consequence that detrimentally impacts cities' ability to regulate and protect the public rights-of-way and cities' right to collect fees for the use of the right-of-way; and (2) a disparity in the treatment of similar providers that will have detrimental unintended consequences.

Proponents of SB 144 are seeking to amend K.S.A. 12-2022(j) in order to exempt direct-to-home satellite service providers and video streaming service providers (e.g., Netflix) from the requirements of the Video Competition Act. However, the exemptions being sought are not necessary, and furthermore, the proposed language of the bill jeopardizes both cities and the state's current ability to franchise and collect fees from traditional providers and users of the right-of-way.

Protection of Direct-to-Home Satellite Services is Unnecessary

Historically cities have never required franchises or charged fees for direct broadcast satellite services because of long established federal law and because the deployment of satellite services has never utilized the public right-of-way. Federal law has long protected direct-to-home satellite service providers and has given exclusive regulatory authority to the Federal Communications Commission. *(47 U.S.C. 303(v))* Given that these satellite services do not utilize facilities in the public right-of-way, there is no way for these providers to become subject to the franchise provisions of the Video Competition Act. Accordingly, proposed subsection K.S.A. 12-2022(j)(2) is unnecessary.

Language for Video Streaming Service Providers is Problematic

The proposed language defining video streaming service providers is confusing and poorly drafted. Proposed subsection (j)(3) defines them as, *"a provider of video programming accessed through a service that enables users to access content, information, email or other services offered over the internet including streaming content."* This definition is overly broad and could easily be misconstrued to also include current video service providers that are the intended subjects of the Video Competition Act (e.g., cable other traditional video service providers). The unintended consequence of this poor draftsmanship jeopardizes cities' ability to continue to collect millions of dollars of video service fees and cities' ability to require these providers to adhere to right-of-way regulations. In addition to the poorly drafted wording of the bill, Overland Park has never considered video streaming service providers subject to the Video Competition Act, and therefore contends this bill is unnecessary.

Need for Franchises and ROW Regulation

Franchises were introduced in the late 1800s as the mechanism for local governments to exercise their sovereign ownership over the public right-of-way for the benefit of the public, to allow responsible construction of private facilities in the right-of-way, and to protect the public from reckless and dangerous deployment. Unfortunately, there is great need for local oversight due to mistakes and mismanagement by the industry, with many providers hiring out-of-state contractors at the lowest price based on an incentive to move quickly without concern for safety or damage to city facilities and other utilities. This has led to cutting streetlight and traffic light circuits; boring through storm drainage pipes; damage to other utilities; installations

that do not match submitted plans; failure to call in utility locates; improper surveys; placing facilities in private property when there is no room left in the right-of-way;

Provider-subcontractor conflicts where neither wants to take responsibility for damage; using right-of-way permits to hold locations in order to anti-competitively block other providers; obstructing vehicular line-of-sight; imposing upon sidewalk ADA requirements; failure to obtain required insurance; gas line disruption; and ignoring fall zone and other safety requirements. Franchises permit cities to hold private industry responsible for these types of actions in the right-of-way, and require all private users to operate under the same set of rules. In conjunction with franchises, cities have adopted right-of-way regulations to establish the rules and regulations for all right-of-way users and to ensure that all are regulated in an equitable manner.

Detrimental Impacts on Cities and the Public and Unintended Consequences

While proponents contend they are only trying to prevent cities from requiring franchises for providers of direct broadcast satellite services and streaming services that do not use the right-of-way, the poorly drafted language of SB 144 sets up the possibility to go well beyond this contention. As stated above, the poorly drafted definitions open the door for traditional video providers to also claim exemption from franchise requirements. Further, new technology and its deployment in this sector continues to evolve at a rapid pace. The Committee must realize that changes in technological deployment opens up the possibility of either of these providers placing facilities in the public right-of-way (e.g., small cell or satellite receptor facilities on street lights). To the extent either of these providers utilizes the right-of-way, they must be required to enter into franchises and to be regulated like every other provider in the right-of-way. Otherwise, these providers may argue they are not subject to the reasonable right-of-way regulations utilized by cities to manage the use of the right-of-way by the City, its residents, its businesses and other service providers. This possible exemption is completely unprecedented and puts the public health, safety and welfare at jeopardy. Until now, every federal and state law for any utility or service provider utilizing the right-of-way has always preserved cities' ability to administer necessary right-of-way regulations and permitting requirements.

Unintended and Consequence Related to Other Providers, Franchise Fees and ROW Regulation

SB 144 also creates the opportunity for litigation from other service providers who may argue they are being discriminated against. We remind the Committee that a primary emphasis of the negotiations of past franchise and wireless law was to preserve cities' ability to charge a fixed right-of-way fee, and cities' ability to regulate the right-of-way. If SB 144 is approved and these providers successfully claim they are exempt from right-of-way/franchise fees and/or cities' right-of-way regulations, it will create a backdoor opportunity for other providers to claim they should also no longer have to pay fees for their facilities or adhere to right-of-way regulations or permitting. For example, Kansas Statute provides:

> *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. K.S.A. 66-2019(d)(1).*

On a similar note, the Statute provides, *"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." K.S.A. 66-2019(d)(2).* Thus, the adoption of SB 144 could unintentionally eliminate all wireless service fees and all regulation of wireless providers and infrastructure providers in the right-of-way. This, in essence, would break the commitments that the Legislature gave to cities during the adoption of KSA 66-2019 (2016) and SB 68 (2019). But the wireless industry will not be the only one. If SB 144 is adopted, the Committee should be prepared for all of the other industries to demand similar treatment. Such deregulation will strip cities' of their ability to manage their rights-of-way and their ability to protect the public at large, create a significant hazard to the public health, safety and welfare, and likely require cities raise revenue from other sources (e.g. property taxes) to compensate for the loss of millions of dollars in franchise/ROW fees.

Thank you for allowing the City of Overland Park to submit testimony on this legislation. We respectfully request that the Committee not approve SB 144. The City would be willing to consider removing its opposition if proposed subsection (j)(3) is revised to be less broad so it will not be misconstrued to exempt current video service providers from the Video Competition Act.