

City Hall

8500 Santa Fe Drive

Overland Park, Kansas 66212

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Date: February 12, 2020

To: Chair Ty Masterson and the Senate Committee on Utilities

From: City of Overland Park

Re: Written Testimony in Opposition to SB 380

Thank you for allowing the City of Overland Park to submit testimony in opposition to SB 380. The City opposes SB 380 because it: (1) detrimentally impacts cities' ability to regulate and protect their rights-of-way; (2) creates the potential unintended consequence of eliminating wireless service fees that were extensively negotiated and provided for when SB 68 was enacted in 2019; and (3) creates a disparity and gives an unfair advantage to cable operators over other utility providers.

Detrimental Impacts on Cities and the Public

SB 380 goes well beyond its stated purpose and completely exempts cable operators from any local right-of-way or safety regulation or permitting requirement. This exemption is completely unprecedented and puts the public health, safety and welfare at jeopardy. Until now, every federal and state law for any utility/provider utilizing the right-of-way has always preserved cities' ability to administer necessary right-of-way regulations and permitting requirements. For example, the Video Competition Act (that SB 380 amends) requires a right-of-way agreement in K.S.A. 12-2024, but under SB 380 this requirement is nullified if the cable operator installs micro wireless facilities. It exempts them from ROW permits, plan reviews, installation standards, safety measures, traffic control measures, and utility coordination. Furthermore, it is not limited to the right-of-way and also exempts applicable land use regulations on private property. Arguably this bill could allow a cable operator to install a 150' monopole in a utility easement in a homeowner's backyard without any coordination or notification. It also arguably grants cable operators the legal right to use city facilities (e.g., light poles, street lights) without an agreement, regulation or compensation.

SB 380 sets a scenario where one industry is for the first time exempt from all local right-of-way and land use regulations and from all public safety and permitting requirements. If it is adopted, the Committee should be prepared for all of the other industries to demand similar treatment in the near future. Such deregulation will cost cities millions of dollars and strip cities' of their ability to manage their rights-of-way and their ability to protect the public at large.

Unintended and Detrimental Consequence - Waiving All Wireless Fees and ROW Regulation

We would remind the Committee that a primary emphasis of the negotiations of SB 68 in 2019 was to preserve cities' ability to charge a fixed right-of-way access fee for wireless facilities. Likewise, a primary emphasis of the negotiations of K.S.A. 66-2019 in 2016 was to preserve cities' ability to regulate the right-of-way. But, if SB 380 is approved so that it waives cable operator fees for wireless facilities and waives their requirement to adhere to right-of-way regulation, it will then create a backdoor opportunity for all wireless providers to claim they should no longer have to pay fees for their facilities or adhere to right-of-way regulations or permitting. 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)*.

Additionally, the Statute further 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 380 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 this Committee and the Legislature gave to cities during the adoption of KSA 66-2019 in 2016 and the adoption of SB 68 in 2019. It would also deprive Kansas cities of millions of dollars in franchise/ROW fees and create a significant hazard to the public health, safety and welfare.

Federal Cable Act

Cable operators contend they need SB 380 to incorporate the provisions of the Federal Cable Act. These arguments are misleading and erroneous. Cable operators already have all the protections available under the Federal Cable Act and there is no need to re-codify it into State law. Further, SB 380 does not simply adopt the provisions of the Federal Cable Act, it instead, inserts language from the FCC’s Third Order, which is currently being challenged in federal courts for exceeding the provisions and authority of the Federal Cable Act. Thus, it appears cable operators are trying to codify the FCC’s Order into Statute just in case the federal courts rule against the FCC. Therefore, we believe it would be premature to adopt this legislation until the federal courts make their ruling regarding the FCC Order. If legislation is necessary to incorporate the Federal Cable Act (which in our opinion it is not), all that is necessary is a short provision incorporating the Act by reference.

Alleged “Competitive Disadvantage” from SB 68

Cable operators claim SB 68 gave wireless providers an “unfair competitive advantage” and that SB 380 is necessary to undo this “disadvantage”, but this assertion is also misleading. The purpose of SB 68 was to prohibit wireless franchises and wireless fees based on gross receipts. However, wireless providers can still be required to enter into a small cell facility deployment agreement or master license agreement, pay a fixed right-of-way access fee, and to abide by applicable right-of-way regulations. To the extent cable operators (or their affiliates) operate as a wireless provider or a wireless infrastructure provider, they are afforded the same benefits - no more, no less.

Despite their claim, SB 380 actually gives cable operators a competitive and unfair advantage over other wireless providers; and it gives them rights not available to other utilities/providers. As stated above, SB 380 exempts cable operators from adhering to applicable right-of-way, permitting, safety and other regulations, which apply to all other utilities/providers. Additionally, these other utilities/providers pay a franchise or right-of-way access fee. It is therefore unfair to exempt cable operators from adhering to right-of-way regulations and paying comparable fees.

Finally it should be noted that most cable operators in Kansas are not actually providing direct wireless service, but instead are installing facilities for separate affiliates providing wireless service. Thus, cable operators’ claim that cities are already compensated by their video service fees rings false.

City’s Position and Legislative Options

It is the City’s position that no legislation is necessary at this time. Cable operators are already protected by the Federal Cable Act, and operators providing wireless services already receive the same benefits as other wireless providers under K.S.A. 66-2019. Cable operators have also failed to show why they should be exempt from necessary right-of-way and safety regulations or pay fees like any other utility/provider. As a result, SB 380 should not be approved.

The above being said, if the Committee still feels legislation is necessary, then it should only incorporate the Federal Cable Act by reference. If the Committee is concerned about unfair fees (despite the protections of K.S.A. 66-2019), perhaps there could be a cap on fee amounts (*e.g.*, \$25/site per year), which would avoid a claim by other providers that cable operators are not paying due compensation. Alternatively, if the Committee is still intent of waiving cable operator fees, at the very least additional language must be added to SB 380 to clearly state that it is the Legislature’s specific intent that this waiver is not intended to trigger the language in K.S.A. 66-2019(d) in order to avoid opening a backdoor to waving all wireless facility fees and regulations.

Thank you for allowing the City to submit testimony on this legislation. We respectfully request that the Committee not approve SB 380.