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SB 547 – OPPOSED – WRITTEN ONLY – MICHAEL KOSS, ATTORNEY

Date: March 14, 2022
To: Chair Robert Olson and the Senate Committee on Federal and State Affairs
Re: City of Overland Park - Written Testimony in Opposition to SB 547

Thank you for allowing the City of Overland Park to submit testimony in opposition to SB 547. The City of Overland Park opposes any legislation that would restrict or repeal the current franchise authority for cities. Additionally, the City specifically opposes SB 547 because it creates: (1) the potential of unintended consequence that detrimentally impacts cities' ability to regulate and protect their public rights-of-way and cities' right to collect fees for the use of the right-of-way; (2) a disparity between the treatment of similar providers that will have detrimental unintended consequence; and (3) a non-uniformity with respect to franchise audit standards.

Detrimental Impacts on Cities and the Public and Unintended Consequences

SB 547 sets up the possibility of unintended consequences that would detrimentally impact cities and the public. For example, with the changes set forth in proposed new section 12-2022(j)(2), proponents may argue they are simply trying to prevent cities from requiring franchises for providers of direct broadcast satellite services; however, changes in technology and technological deployment will create unintended consequences that will result in future legal challenges over the meaning and intent of this legislation. Historically cities have never required franchises or charged franchise fees for direct broadcast satellite services because of: the deployment of these services has never utilized the public right-of-way; and long established federal law regarding direct broadcast satellite services. What the Committee needs to realize is that changes in technological deployment now opens up the possibility of these providers placing facilities in the public right-of-way. To the extent that they utilize the right-of-way, these providers 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. Further this proposal conflicts with other Kansas Statutes granting cities the right to reasonably regulate and manage their rights-of-way.

The changes in proposed new section 12-2022(j)(3) are also problematic as they seek to allow an entire category of businesses that profit off of the use of the public right-of-way to avoid paying franchise fees like every other business user. Additionally, these changes are problematic for the same reasons addressed in the preceding paragraphs regarding the impact to the regulatory use of the public right-of-way; and the result will lead to litigation and will jeopardize the public health, safety and welfare.

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.

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

SB 547 also creates the opportunity for litigation from other service providers who may argue they are being discriminated against. We would also 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 access fee, and cities' ability to regulate the right-of-way. But, if SB 547 is approved and these providers are successful in a claim they are exempt from paying right-of-way access/franchise fees and/or from cities' right-of-way regulations, it will then 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 547 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 547 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.

Non-Uniformity of Franchise Audit Standards

Kansas Statute 12-2024(f) establishes the right of a municipality to audit a video service provider's calculation of the video service provider fee. While the City is not opposed to further clarification of the audit provisions, the City is opposed to the new audit language being proposed. The proposed language has either errors, inconsistencies or requirements that will unnecessarily create legal issues. For example, the City is uncertain what entity is "a court of competition jurisdiction" and believes any such challenge is more appropriately brought in the appropriate State court. (For Overland Park this would be the District Court of Johnson County.) Further, the proposed language sets up different audit criteria and standards than the audit criteria and standards established for other similar providers, which opens the door for claims of discrimination and unfair treatment between providers. If the Committee determines that further clarification of the audit provisions is necessary, then the City recommends using the audit language for telecommunications franchises set forth in K.S.A. 12-2001(j)(2).

City's Position

Thank you for allowing the City to submit testimony on this legislation. We respectfully request that the Committee not approve SB 547.