

Date: March 14, 2019
To: Chairman Seiwert and the House Committee on Energy, Utilities and Telecommunications
From: City of Overland Park
Re: Written Testimony in Opposition to SB 68

Thank you for allowing the City of Overland Park to testify in opposition to SB 68, which allows the wireless industry to become the only private industry exempt from franchises. This legislation is unnecessary to encourage deployment of wireless facilities in Kansas and gives preferential treatment to one industry within cities' right-of-way (ROW).

Franchises were introduced in the late 1800s as the mechanism for local government to exercise sovereign ownership over the ROW for the benefit of the public, to allow responsible construction of private facilities in the ROW, and to protect the public from unsafe and dangerous deployment. There is a 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, private property, and other utilities. Some examples of this are: 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 ROW; provider-subcontractor conflicts where neither will take responsibility for damage; using ROW 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; failure to restore private property; and ignoring fall zone and other safety requirements.

Franchises permit cities to hold private industry responsible for these types of actions in the ROW, and require all private users to operate under the same set of rules. Although the wireless industry often claims their facilities are unique because they only include antennas, they actually include similar facilities as traditional utilities (e.g. poles, ground utility boxes, buried fiber or fiber hung on utility poles).

Ending wireless franchises has potentially significant legal repercussions. Kansas courts have acknowledged franchise requirements balance the industry's statutory right to use the ROW, a right created in 2016 for wireless and wireless infrastructure providers by K.S.A. 66-2019 *et seq.* (the "Wireless Siting Act"). To upset this balance in favor of the industry will result in more unilateral decisions by the industry about their use of the ROW for business purposes, and diminish cities' ability to police this use and protect the public.

Giving the wireless industry preferential treatment in the ROW will also have important regulatory and financial consequences. Federal law¹ requires that cities not discriminate against telecommunication providers with their ROW regulations. By prohibiting wireless franchises, SB 68 risks other telecommunication franchisees (e.g. local exchange carriers, like AT&T) challenging their franchises under federal law. All franchise fees assist cities in paying for the cost to manage the public ROW and if all are potentially deemed unlawful, cities will need to shift costs of services to other revenue sources (e.g. property taxes).²

The wireless industry has been unable to identify any real harm caused by franchises. Even if the industry's unsubstantiated fears of exorbitant fees and long franchise negotiation times were warranted, each of these is addressed by existing law or the FCC's recent Small Cell Order (which caps fees and subjects franchise application reviews to federal shot clocks).³ Preempting wireless franchises when they're not causing any harm only invites other industries to seek similar treatment.

¹ 47 U.S.C.S. § 253(c).

² Cities spend millions of dollars to purchase needed ROW, and franchise fees help offset these costs.

³ Declaratory Ruling and Third Report and Order, WT Docket No. 17-79 (2018).

The wireless industry has not only failed to identify a harm from franchises, they've actually cited Kansas cities for their wireless-friendly regulations (including their franchise requirements). In the petition that resulted in the FCC's Small Cell Order, the industry cited 13 cities across the nation that were models for requiring low fees and having streamlined applications processes, and two of those 13 are Kansas cities (Overland Park and Olathe).⁴ Most other Kansas cities dealing with small cell deployments have similarly low franchise fees (generally \$25 per site per year) and streamlined processes. Of note, Overland Park and Olathe were cited by the industry as models even though they both require wireless franchises.

It is also not completely factual that wireless franchises are preventing AT&T from deploying in Kansas. In fact, AT&T has recently entered into numerous small cell franchises with cities in other states across the country.⁵ Any decision to not enter similar agreements in Kansas is simply a business decision.

The significant deployment activity taking place in Overland Park is more evidence that wireless franchises are not a barrier to deployment. The City currently has 4 wireless franchises (going back to 2011); over 75 existing small cell sites; 32 more permits issued; 9 applications pending; and we expect 100+ more sites in 2019 and again in 2020. Verizon has a franchise with Overland Park and other cities and is currently deploying. Fiber companies (including AT&T and Verizon's affiliate MCIMetro) are already installing fiber in the City's ROW to support wireless small cell deployment. This activity is proof that wireless franchises are not preventing the wireless industry from deploying in Kansas.

Although the negotiated agreement between the industry and the League of Kansas Municipalities makes SB 68 better, for all of the aforementioned reasons, we respectfully request that the Committee not advance SB 68 to the full House. If the Committee feels compelled to use SB 68 to address statewide wireless deployment, the City suggests amending the bill to correct a technical mistake in subsections (T)(2) and (T)(3). Subsections (T)(2) and (T)(3) are intended to limit the scope of SB 68's preemption to only small cell facilities. However, the current language creates a possible loop hole for fiber companies to claim they either are providing or can provide backhaul facilities and are therefore exempt from any franchise requirement. We do not think this is the intent of the legislation, and respectfully request that if the Committee advance SB 68, that they adopt the amendment below. Thank you for your consideration.

18 *(C) may assess a wireless services provider or a wireless*
19 *infrastructure provider a fixed right-of-way access fee for each small*
20 *cell facility that the provider deploys that requires use of the city's public*
21 *right-of-way, but such fee shall not be based on such provider's gross*
22 *receipts derived from services provided within the city's corporate limits.*

23 *(2) The provisions of paragraph (1) shall only apply to a wireless*
24 *infrastructure provider to the extent of such provider's operations and*
25 *services as a provider for the deployment of small cell facilities in the*
26 *city's public right-of-way that are used for the provision of wireless*
27 *services. Nothing in this subsection shall be construed to apply to such*
28 *provider's other operations and services as a utility or otherwise or have*
29 *any effect on any franchise that is related to such other operations and*
30 *services.*

31 *(3) Nothing in this subsection shall be construed as prohibiting a*
32 *city from requiring a telecommunications local exchange service*
33 *provider to enter into a valid contract franchise ordinance pursuant to*
34 *this section.*

wireless services
provider or

, or for the
purpose of wired
backhaul
facilities,

or a provider of any
other non-wireless
services

⁴ Mobilitie, LLC Petition for Declaratory Ruling, *Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way* (filed Nov. 15, 2016) (Mobilitie Petition).

⁵ See small cell franchise agreements with: City of SeaTac, WA (<http://www.seatacwa.gov/home/showdocument?id=23564> - pages 37-63); Tukwila, WA (<http://mrsc.org/getmedia/b55bb2b1-41f9-4129-be12-359e273cb9d6/t8o2583telecom.pdf.aspx>); Portland, OR (<https://www.portlandoregon.gov/auditor/article/706839>)