HOUSE
RESEARCH
ORGANIZATION bill analysis 5/12/2005

HB 3179
P. King
(CSHB 3179 by P. King)

SUBJECT: State cable franchise and communication facilities located in rights-of-way

COMMITTEE: Regulated Industries — committee substitute recommended

VOTE: 4 ayes — P. King, Hunter, Crabb, Hartnett

0 nays

3 absent — Baxter, R. Cook, Turner

WITNESSES: For — Mark Witcher, AT&T

Against — Kathy Grant, Texas Cable and Telecommunications Association; Ron Hinkle, Verizon Wireless (*Registered, but did not testify*: Jon Gary Herrera, Time Warner Cable; Tom Kinney, Texas Cable and Telecommunications Association; Susan Patten, Stacy Schmitt, Time Warner Cable; Terral Smith, Covad, Inc., Nextel, Inc.; Gary Underwood, Time Warner Cable)

On — Brandon Aghamalian, City of Fort Worth; Monte Akers, Texas Coalition of Cities for Utility Issues; Steve Banta, Verizon Southwest; Eric Beverly, Office of Community Rural Affairs; Snapper Carr, Texas Municipal League; Larry Casto, City of Dallas; Kristie Flippo, Time Warner Telecom; Timothy Leahy, SBC Communications; Thomas Ratliff, Western Wireless; Martha Smiley, Grande Communications; Ben Watson, Sprint; Clarence West, City of Austin and City of Houston

BACKGROUND: U.S.C. title 47, ch. 5, subch. 5-A regulates cable service providers. Sec. 47.541 authorizes a municipality to award a franchise to a cable provider authorizing construction of a cable system in the municipality's jurisdiction. It requires a provider to assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents. Under sec. 47.542, a municipality may require a provider to pay a fee for its franchise. A municipality may regulate the services and fees of a franchised provider to the extent provided under federal law.

C.F.R. 76.309(c) requires cable operators to maintain certain basic customer service standards, which govern office hours, 24-hour telephone availability, installation, service calls, outages, and billing.

DIGEST: CSHB 3179 would establish a statewide franchise authorizing a cable or video service provider to offer service in the state. The bill also would establish provisions governing rights-of-way access by communications service providers and compensation for relocation of communications facilities. In addition, the bill would direct the PUC to conduct a study on municipal compensation for access to rights-of-way.

Statewide cable franchise.

An entity seeking to provide cable or video service in the state would be required to file an application for a state franchise with the secretary of state. The application would include an affirmation that the entity had filed all required federal forms, an agreement to comply with all applicable state and federal regulations, a description of the geographic areas to be served, and the entity's principal place of business and executive officers.

The franchise certificate issued by the secretary of state would grant authority for the entity to provide cable or video service and use public rights-of-way to deliver that service. This authority would be subject to a requirement that the applicant lawfully operate the service.

***Municipal franchises*.** As of September 1, 2005, a cable service provider could terminate any municipal franchise by providing notice to the affected municipality. Such a provider would have to remit any franchise fees that had been accrued but not paid within 90 days. The provider could deduct any credit from future fees it had to pay.

A provider choosing to terminate an existing franchise or initiate service after September 1, 2005 would have to pay each municipality a fee equal to 5 percent of the provider's gross revenues. The fee would be paid quarterly and would be accompanied by a summary explaining the calculation. A provider could recover this fee from its customers.

"Gross revenues" would be defined as:

- all considerations derived by a provider from the from its cable or video service system in the municipality;
- all fees charged to cable or video service subscribers;

- commissions paid to a provider for exhibition of products through "home shopping" programs;
- a portion of advertising revenue, calculated by dividing the number subscribers in the municipality by the subscribers related to the relevant regional or national advertising compensation arrangement.

Gross revenues would not include:

- revenue billed but not received;
- revenue received by an affiliate in exchange for goods or services used by the provider for cable or video service;
- discounts provided to subscribers, leasing providers, advertisers, or a municipality;
- revenues from non-cable or non-video services, including telecommunications or Internet services;
- revenues paid by subscribers to home shopping producers;
- the sale of service for resale by another, provided that the other provider collected the 5 percent franchise fee from customers;
- any tax imposed upon the provider or its subscribers;
- service provided at no charge, as required by a municipality, including service to schools or government entities;
- revenue foregone through provision of reduced cost service;
- sales of capital assets or equipment;
- reimbursement by programmers for marketing costs incurred by the provider; or
- directory or Internet advertising revenue.

A municipality would be prohibited from preferring or discriminating against any cable or video service provider under a state franchise. A municipality only could:

- require a provider to register with the municipality and provide a point of contact;
- establish guidelines regarding the use of public access channels; and
- require a provider to submit a report addressing any failure by the provider to comply with applicable customer service standards.

If a provider did not submit customer service reports or if the reports verified non-compliance, the municipality could file a court proceeding.

A municipality could not require compensation for a provider's right or privilege to provide service or use of a public right-of-way.

Quality of service. A cable or video provider could not deny access to service by a group of potential residential subscribers in an area because of the income of residents. A provider could satisfy this requirement by using an alternative technology, even if that alternative differed in terms of content or functionality. Neither the state nor a political subdivision could require a provider to build out a network, except as specifically required under federal law.

An affected person, including a municipality in which an affected person lived, could seek enforcement of this provision by initiating a proceeding in a court of competent jurisdiction. Should a court find a provider in violation, the court would order compliance by the provider. Failure to comply would result in penalties that could include revocation of the provider's state franchise.

Federal customer service requirements under C.F.R. 76.309(c) would apply until there were more than two providers offering service (including direct-to-home satellite service) in an area.

Public access channels. Within 120 days after receiving a municipal request, cable or video service provider would have to provide the municipality with capacity in its network to allow public, educational, and governmental access channels (PEGs), where technically capable. If a municipality did not have PEGs as of September 1, 2005, the provider would have to provide:

- up to three PEGs for a municipality of at least 50,000; and
- up to two PEGs for a municipality of less than 50,000.

If a municipality did have PEGs before September 1, 2005, the provider could not provide fewer PEGs than the amount that a municipality had.

A provider could place any channel used by a municipality on any tier of service, except that the municipality could designate up to three PEGs (or two for a municipality less than 50,000) for the lowest service tier for which no equipment was required to receive the channel. If the service was provided only in digital format, the PEGs would be in that format.

If a municipality had not used the three PEGs (or two for a smaller municipality) within 120 days after it had requested the PEGs, access to the additional channel capacity would be provided only if, upon 90 days written notice, the municipality met the following standards:

- if the municipality had one active PEG and desired to activate an additional PEG, the initial channel would be considered actively utilized when at least 12 hours daily were programmed on that channel and at least 40 percent of this programming was nonrepeat programming on average over each calendar quarter;
- if the municipality had two active PEGs and desired to activate an additional PEG, the two would be considered actively utilized when at least 12 hours on each channel on each day were programmed and at least 50 percent of this programming was nonrepeat programming on average over three consecutive calendar quarters.

"Nonrepeat programming" would include the first three times a program was video-cast.

A municipality would have to pay for any construction required to establish a connection between the municipality's origin point and the provider's network. The operation of a PEG would be the municipality's responsibility. Any PEG that was not utilized for at least eight hours a day no longer would be made available to the municipality and could be programmed at the provider's discretion. The PEG could be restored, but the provider would have no obligation to carry the channel on a basic or analog tier. The municipality would be responsible for ensuring that all programming over a PEG was submitted in a format capable of being transmitted by the provider.

A municipality could not require a provider to pay any fee to support PEGs.

Grandfathered services. Whether or not a cable provider chose to terminate a municipal franchise as authorized by this bill, a provider that had been operating under a municipal franchise would be required to continue certain services that it had been furnishing under its terminated franchise until the earlier of 2008 or the date on which its franchise was going to expire. This would include:

- network capacity for noncommercial use by the municipality, if the municipality paid the provider the incremental cost associated with providing the service; and
- cable services to community buildings such as municipal or public school buildings.

Applicability of other laws. Nothing in the bill would prevent a municipality or voice, cable, or video service provider from seeking clarification of its obligations under federal law or exercising any right under federal or state law.

Rights-of-way access by communications service providers

A municipality would be required to allow a communications service provider to install, construct, and maintain a network within a public right-of-way and grant the provider open, nondiscriminatory, and competitively neutral access to the right-of-way. A municipality could not discriminate against a provider regarding placement of a network in a right-of-way, access to a building, or municipal utility pole attachments. A "communications service provider" would be defined as any entity that provided voice, video, telephone, telegraph, communications, cable, information, broadband, or other form of advanced telecommunication services.

A municipally owned utility could not charge a pole attachment fee higher than the fees a federally regulated telecommunications utility could charge.

Municipal regulations. A municipality could enforce police power-based regulations in its management of rights-of-way. A municipality could not impose the following regulations on the activities of a provider:

- requiring that a business office be located in the municipality;
- requiring reports that were not required under state or federal law, other than records illustrating the portions of networks in rights-of-way;
- inspection of a provider's business records;
- approval of a transfer of a business's ownership;

- requiring that a self-insured provider obtain bonding, except that the self-insured provider had to provide the same defense and claims processing as an insured provider; or
- requiring bonds from a provider for aerial construction work, except from a provider that could not demonstrate at least four years' of work free of unsatisfied municipal claims.

A municipality could require a construction permit to a provider. A municipality would have to promptly process applications from a provider seeking to take construction or similar action. In the event of an emergency necessitating a repair, the provider could begin the repair without approval from the municipality if the provider notified the municipality promptly after beginning work and subsequently obtained approval.

Indemnity. A provider would indemnify and hold a municipality harmless against claims, lawsuits, and other actions, including personal injury or property damage that was found to be caused by negligence of the provider or a subcontractor of the provider while installing or maintaining facilities in a right-of-way.

Relocation of communications facilities.

Project design. A municipality would have to consider a design that minimized relocation of any communications facility when designing a public improvement project. If relocation of a communications facility proved necessary, the municipality would have to give the provider:

- sufficient notice so that the provider had time to offer design alternatives; and
- plans that would allow the provider to develop alternatives and determine the relocation costs.

The municipality would have to convene a meeting to allow the provider to discuss potential design alternatives to minimize facility relocation costs. A municipality would have to provide reasons for rejecting proposed alternatives.

Facility relocation. A municipality could require a provider to relocate its facility to accommodate an improvement project. Costs related to the relocation would be at the municipality's sole expense, except that a provider would bear costs associated with widening or straightening a roadway.

A provider would have to relocate its facility if the municipality had:

- given the provider 30 days written notice that the municipality had decided facility had to be relocated;
- specified the new location for the facility; and
- agreed upon a reasonable time frame for relocation of the facility that was at least 90 days after notice was provided.

The municipality could relocate the facility at the provider's expense if the provider failed to comply with its obligations. The time allowed for relocation could be extended upon mutual consent of the parties or in accordance with generally acceptable industry standards.

These requirements would not apply if inaccurate information given by a provider led to a municipality determining that relocation of a facility was required during the construction process of an improvement project. In such an instance, the two parties would reach an agreement regarding relocation based upon accepted industry standards.

Federal funds allocated for facility relocation would have to be used for a relocation. If relocation was required before the third anniversary of a project's completion date, the municipality would pay the costs, whether or not the relocation was due to widening or straightening a roadway.

***Billing and payment*.** Upon completion of a project, a provider could submit an invoice of its relocation costs, and the municipality would have to pay the provider within 60 days.

***Municipal proceedings*.** Prior to September 1 of each year, each public improvement project planned for the next year that required communication facility relocation would have to initiate a planning proceeding. Each communications provider would have to submit information regarding the amount of linear feet in public rights-of-way in which a facility existed, cost forecasts associated with relocation for the next year, and maps showing the location of the provider's facilities.

"Linear foot" would be defined as the entire width of a right-of-way, excluding public utility easements not adjacent to a public roadway.

Following the proceedings, the municipality would issue findings detailing the area occupied by communication networks, the average relocation costs for providers, and the relocation costs for the municipality per linear foot.

Relocation Assessment. Beginning January 1, 2006, a municipality could collect facility relocation fees from each communications network provider operating in the municipality. The fee could recover the costs of all relocation not paid for directly by providers.

A provider would pay the fee based on the amount of linear feet of public right-of-way occupied by the provider's communications facilities in the municipality. The provider would pay the fee regardless of the type of facility, whether the facility was leased to another provider, or whether the facility was above or below ground. A municipality could assess the fee only if it had an improvement project budgeted for the next year.

Right-of-way management fee. A municipality could charge an annual rate of up to $100 for each provider with facilities in a right-of-way.

Payment schedule and penalties. A provider would have to remit fees to a municipality on a quarterly basis. Assessments could be apportioned between business and residential customers, but a provider could not include any charge in the sales price for its services.

A municipality could assess penalties for failure to pay a fee or failure accurately to report required information.

Other provisions.

Study. The PUC would conduct a study and issue a report to the Legislature by September 1, 2006, containing recommendations regarding municipal compensation from voice, video, and cable providers.

Repealed. The bill would repeal Utilities Code, ch. 62, which governs broadcaster safeguards.

Effective Date. The bill would take effect September 1, 2005.

SUPPORTERS SAY:

Statewide video service franchise. By establishing a level playing field for competition and choice in cable and video services, CSHB 3179 would put Texas at the forefront of regulatory modernization in this rapidly innovating industry. New technologies like high-speed fiber to the home and broadband provide for the convergence of voice, data, video, and other services, maximizing the benefits the consumer could receive from information technology. This bill is necessary to allow deployment of integrated technologies and encourage private investment that would benefit Texas consumers.

CSHB 3179 would streamline state and municipal regulation of cable service providers. Currently, before a cable provider enters a market, that provider must negotiate a franchise agreement with a municipality, an expensive and inefficient process. The result is a maze of regulations that present a barrier to entry for cable competitors. By establishing a statewide franchise, the bill would eliminate the need to negotiate individual agreements while establishing a system of stable, predictable franchise fees that have become a vital component of city budgets.

CSHB 3179 would allow Texas customers to enjoy the benefits of competition in cable service that they have enjoyed in telecommunications service since the mid-1990s. Currently, incumbent cable companies generally operate as monopolies under local franchise agreements, limiting the amount of competition and consumer choice in most communities. The bill would tear down barriers to market entry and competition by ensuring that all video service providers could operate under a single set of clear, equitable rules.

Federal law on the issue of cable regulation is unsettled, and Texas should provide leadership by ensuring that all companies could compete on a level playing field. Municipalities and providers would be allowed to seek further clarification from the courts or the FCC as to their obligations, allowing Texas to be at the vanguard of regulatory innovation.

Current safeguards that benefit cities, schools, and consumers would be affirmed under CSHB 3179. The bill would provide for a base number of public access channels that many cities use for educational and civic purposes. The bill would incorporate federal requirements prohibiting discriminatory treatment of low-income citizens but would allow companies to meet this obligation through new technologies rather than archaic network build-out mandates. Federal customer service requirements would remain in place until adequate competition existed in an area.

Municipal right-of-way compensation. The bill also would clarify state law to provide communications service providers with explicit authority to use public rights-of-way for their networks. The bill would establish a fair, balanced system to enable municipalities and providers to minimize conflicts when network facilities had to be relocated to allow for public improvement projects. The relocation fee established under the bill would ensure consistent contributions from all network providers and give municipalities an assurance that relocation costs would not exceed amounts budgeted.

OPPONENTS SAY:

Statewide video service franchise. CSHB 3179 would discriminate against existing cable providers that are subject to extensive federal, state, and local regulations governing network build out, quality of service, and public access channels, among other requirements. Cable companies that have built networks throughout entire cities would be at a disadvantage compared to new entrants that could build only in neighborhoods with the most profit potential. SBC and other major telecommunications providers would be able to corner the most lucrative sections of the market, harming consumers and providing only the illusion of true competition.

Under the guise of "intermodal competition," CSHB 3179 would open the door to abusive redlining practices by new entrants in the cable market. The bill would purport to allow "alternative technologies" to satisfy to satisfy nondiscrimination mandates. However, the availability of ubiquitous yet expensive direct-to-home satellite technology likely would satisfy nondiscrimination requirements while remaining an unrealistic option for low- or middle-income consumers. New providers would be free to build video networks in higher income areas while denying the cost and service benefits of new technologies to low-income Texans.

CSHB 3179 would undermine local control for cities that currently can negotiate cable franchise agreements that are appropriate to the diverse needs of cities across the state. The bill would allow cable providers to opt out of negotiated agreements that often provide cities with the ability to enforce customer service standards and ensure universal service. In addition, franchise agreements provide many cities with services and grants that would be lost under the bill. The LBB estimates that Houston, Dallas, Austin, and Fort Worth all would lose from $1-2 million annually.

The uniform franchise under the bill would impose a one-size-fits-all solution that simply would not work for many communities.

Municipal right-of-way compensation

CSHB 3179 would add yet another fee to consumers' telecommunications bills. Texas consumers are subject to some of the highest taxes and fees on telecommunications services in the nation, and the relocation assessment would only make this burden heavier.

OTHER OPPONENTS SAY:

By initiating vast policy changes while also requiring the PUC to study the issue of municipal fees from communications service providers, CSHB 3179 effectively would "put the cart before the horse." While municipal right-of-way compensation and cable franchising clearly are in need of reform, the Legislature should allow the PUC to study the issue first and then provide recommendations. The Legislature should initiate dramatic policy changes such as those in CSHB 3179 only after it has a better sense of what the impact of these proposals might be.

NOTES:

As filed, HB 3179 would have imposed a 3.95 percent "intermodal competition assessment" on each sale of a communications service by a communications service provider and would have required the comptroller to disburse this assessment to municipalities for their share of right-of-way compensation costs.

The committee substitute added provisions relating to the state cable franchise.