

- SUBJECT:** State-issued certificates of franchise authority to provide cable service
- COMMITTEE:** State Affairs — committee substitute recommended
- VOTE:** 9 ayes — Cook, Craddick, Frullo, Gallego, Hilderbran, Huberty, Oliveira, Smithee, Turner
- 0 nays
- 4 absent — Menendez, Geren, Harless, Solomons
- WITNESSES:** For — Ron McMillan, Time Warner Cable & Texas Cable Association; Bill Peacock, Texas Public Policy Foundation
- Against — (*Registered, but did not testify*: Homero Lucero, Century Link; Cindy Mallette, Americans for Prosperity)
- On — Snapper Carr, Texas Municipal League (TML); Tom Giovanetti, Institute for Policy Innovation; Richard Lawson, Verizon; (*Registered, but did not testify*: Clarence West, TML)
- BACKGROUND:** In 2005, the 79th Legislature enacted SB 5 to allow cable or video service providers to file an application for a state-issued certificate of franchise authority (SICFA) with the Public Utility Commission (PUC). Prior to SB 5, providers were required to make franchise agreements with the cities where they hoped to offer service. SB 5 did not affect existing franchise agreements of incumbent operators; the bill allowed them to finish out their contractual periods. SB 5 did allow new market entrants to apply for SICFAs.
- Tax Code, sec. 66.006 requires providers to pay 1 percent of gross receipts to cities to be used to pay for public, educational, or government (PEG) access channels. Cities may use these funds in furtherance of PEG programming as laid out in 47 U.S.C., sec. 542(g)(2)(C).
- DIGEST:** CSHB 256 would make several changes to the state and municipal franchise agreements between cable and video service providers and cities.

**Municipal franchise agreement termination.** CSHB 256 would allow providers that still had municipal franchise agreements to terminate all of their municipal franchise agreements and apply for a SICFA. Municipal agreements would be terminated on the date the PUC issued a SICFA to the provider for the area served under the terminated franchise.

**PEG fee usage.** CSHB 256 would direct SICFA providers to include with a PEG fee paid to a city a statement identifying the fee. If a city used PEG fees for the purposes allowed under certain federal rules, then the fees would not be a credit against franchise fee payments. If the city used the fees for another purpose, they would be credits against franchise fee payments.

Cities would be required to keep the fees in a separate account not to be commingled with other money. On request, cities also would be required to provide an accounting of the use of the fees to the provider that paid them in the preceding calendar year.

**Private line data network capacity.** Providers could discontinue providing private line data network capacity upon expiration or termination of a municipal cable franchise agreement. However, private line data network capacity in cities with populations larger than 1 million people would continue to be provided, but for no longer than an original municipal franchise agreement would have provided.

**PEG channels.** CSHB 256 would allow cities that had not yet received the maximum number of PEG access channels as of September 1, 2005, to request from a provider:

- up to three PEG channels for a city with a population of at least 50,000; and
- up to two PEG channels for a city with a population of less than 50,000.

**Franchise records.** The bill would place a cap on the period of time in which cities could review records that related to franchise fee payments to the preceding 48-month period.

**Effective date.** The bill would take effect on September 1, 2011, and would apply only to transfers, deposits, and disbursements made on or after that date.

SUPPORTERS  
SAY:

CSHB 256 would equalize the treatment of landline cable providers in Texas. The bill would further streamline regulation of the industry by reducing regulation further and leveling the playing field among market participants. CSHB 256 would increase competition resulting in greater user choice, more competitive pricing, and the introduction of the latest technology into the cable market.

**Opt into the SICFA regulatory regime.** SB 5 did not allow incumbent providers to break their existing municipal agreements and opt into the state agreements. Entrants to the market have been able to adopt SICFAs, which often have more flexible terms. Incumbents are forced to continue to operate under municipal agreements that charge higher fees and interfere with some business decisions. Since Texas first created SICFAs in 2005, 19 other states have started offering them, but all of them allow incumbent providers to adopt them. Texas is the outlier, and CSHB 256 would place it back at the forefront of market freedom and flexibility.

**Private-data networks.** CSHB 256 would remove the requirement that providers offer and support private data networks. These underutilized networks use expensive and antiquated technology, for which it is sometimes difficult to find parts.

The bill would allow Dallas to continue to receive and use its existing private data network, but for no longer than when the municipal franchise would have expired.

**PEG fees.** The bill would require cities to more clearly account for the usage of payments-in-kind, which under federal law are to be used to support PEG channels. If cities use the payments for purposes not allowed by federal law, then the payments would count as credits on the providers' franchise fee payments. Many providers report having to pay these fees to cities that do not offer or support a single PEG channel. The bill would not be too restrictive; it only would require that cities follow existing law.

**Look-back audit period.** The bill would clarify existing law to provide a maximum period within which providers could request information on franchise payments. This change would give providers clarity on data storage and records retention.

**Lawsuit interception.** The Legislature provides statutory clarification

routinely to settle and prevent contentious litigation. If a policy is outdated or has ceased to serve its purpose, then the Legislature should change it. CSHB 256 would do so and would act well within its powers to establish and alter regulations of industry.

**Contingency provision.** The contingency provisions contained in the Senate companion bill, SB 1087 by Carona, are not appropriate. CSHB 256 should not be contingent on other legislation passing. The reforms sought by CSHB 256 are meritorious in their own right and can and should stand alone.

**Fee v. Tax Language.** Declarations in the Senate-passed companion bill that franchise fees are fees and not taxes are unnecessary and totally irrelevant to this bill. The language is an attempt by cities to codify controversial case law into statute. If the Legislature sees fit to split such definitional hairs, it should do so in another bill.

**Respecting existing agreements to bury cable lines.** CSHB 256 properly does not include language in SB 1087 that would require a provider that had agreed to bury certain cable lines as part of a municipal franchise agreement to continue to agree to bury them before terminating the municipal franchise agreement and adopting a SICFA. This provision would defeat the purpose of CSHB 256 because it could prohibit transition to SICFAs.

OPPONENTS  
SAY:

CSHB 256 would abrogate existing municipal franchise contracts between cities and providers. These agreements were formed between willing and sophisticated parties, and the Legislature should not intervene on behalf of industry. Dallas, Corpus Christi, McAllen, and Lubbock still have municipal franchise agreements with operators.

**Lawsuit interception.** The bill is designed to intercept a lawsuit on behalf of industry against cities. Cable industry groups have sued cities seeking to break their municipal franchise agreements. However, cities have successfully defended the agreements several times in court. CSHB 256 would allow providers to break their existing contracts with cities and adopt SICFAs instead.

**Contingency provision.** The bill could result in significant loss to cities of franchise fee revenue. The companion bill, SB 1087 by Carona, as passed by the Senate contained a contingency provision saying it would not take

effect unless and until the Legislature allowed local governments to collect sales taxes on satellite television providers. This provision would allow cities to make up lost revenue and to apply sales taxes evenly across similar services.

**Fee v. tax language.** The bill would not clarify that franchise fees are fees and not taxes. This clarification is necessary to help prevent future legal challenges. The 1893 U.S. Supreme Court case, *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, held that franchise fees are rent on the use of public right-of-way and not taxes. Several attorney general opinions and Texas Supreme Court and federal Fifth Circuit rulings have agreed. This classification has been increasingly challenged. The Senate-passed version of SB 1087 contained this important and clarifying language.

**PEG fees.** CSHB 256 would be too restrictive on usage of PEG fees. Federal law allows cities to use PEG fees for capital investments. Cities need, and federal law allows, flexibility in use of PEG fees. Cities use them for programming and infrastructure investments like studios, computers, and film equipment.

CSHB 256 would introduce burdensome reporting requirements on cities. Requiring cities to segregate fees and offer reports on spending when providers requested them is a needless mandate imposed on Texas cities for the benefit of industry.

**Respecting existing agreements to bury cable lines.** The bill should include protections for cities that may lose important rights and benefits if their municipal franchise agreements are terminated. For example, Lubbock has an agreement as part of its downtown redevelopment efforts where the local provider is to bury its landlines underground. Should CSHB 256 pass, the city would not be able to enforce this provision under its existing municipal franchise agreement.

NOTES:

According to the LBB's fiscal note, CSHB 256 would have no significant fiscal implication to the State.

The companion bill, SB 1087, passed the Senate by 25-5 (Birdwell,

Harris, Nichols, Patrick, Shapiro) on April 6 and was reported favorably, as substituted, by the House State Affairs Committee on April 28, making it eligible to be considered in lieu of HB 256.