

HOUSE BILL No. 2237

By Committee on Local Government

1-31

Proposed Amendment on HB 2237
House Committee on Energy, Utilities and
Telecommunications
February 17, 2023
Prepared by the Office of Revisor of Statutes

1 AN ACT concerning counties; relating to public right-of-way; authorizing
2 certain telecommunications and video service providers to operate in
3 the county right-of-way; amending K.S.A. 2022 Supp. 17-1902 and
4 repealing the existing section.
5

6 *Be it enacted by the Legislature of the State of Kansas:*

7 Section 1. K.S.A. 2022 Supp. 17-1902 is hereby amended to read as
8 follows: 17-1902. (a) (1) "Public right-of-way" means only the area of real
9 property ~~in which that the city municipality~~ has a dedicated or acquired
10 right-of-way interest in the real property. ~~It shall include "Public right-of-~~
11 *way" includes* the area on, below or above the present and future streets,
12 alleys, avenues, roads, highways, parkways or boulevards dedicated or
13 acquired as right-of-way. ~~The term "Public right-of-way" does not include~~
14 the airwaves above a right-of-way with regard to wireless
15 telecommunications ~~or~~ other nonwire telecommunications or broadcast
16 service, easements obtained by utilities or private easements in platted
17 subdivisions or tracts.

18 (2) "Provider" means a local exchange carrier as defined in K.S.A.
19 66-1,187(h), and amendments thereto, or a telecommunications carrier as
20 defined in K.S.A. 66-1,187(m), and amendments thereto, or a video
21 service provider as defined in K.S.A. 2022 Supp. 12-2022, and
22 amendments thereto, but does not include an applicant as defined in
23 K.S.A. 66-2019, and amendments thereto.

24 (3) "Telecommunications services" means providing the means of
25 transmission, between or among points specified by the user, of
26 information of the user's choosing, without change in the form or content
27 of the information as sent and received.

28 (4) "Competitive infrastructure provider" means an entity which
29 leases, sells or otherwise conveys facilities located in the right-of-way, or
30 the capacity or bandwidth of such facilities for use in the provision of
31 telecommunications services, internet services or other intrastate and
32 interstate traffic, but does not itself provide services directly to end users
33 within the corporate limits of the ~~city~~ *municipality*.

34 (5) *"Municipality" means any city or county.*

35 (b) Any provider shall have the right pursuant to this act to construct,
36 maintain and operate poles, conduit, cable, switches and related

1 appurtenances and facilities along, across, upon and under any public
2 right-of-way in this state. Such appurtenances and facilities shall be so
3 constructed and maintained as not to obstruct or hinder the usual travel or
4 public safety on such public ways or obstruct the legal use by other
5 utilities.

6 (c) Nothing in this act shall be interpreted as granting a provider the
7 authority to construct, maintain or operate any facility or related
8 appurtenance on property owned by a ~~city~~ *municipality* outside of the
9 public right-of-way.

10 (d) The authority of a provider to use and occupy the public right-of-
11 way shall always be subject and subordinate to the reasonable public
12 health, safety and welfare requirements and regulations of the ~~city~~
13 *municipality*. A ~~city~~ *municipality* may exercise its home rule powers, *to the*
14 *extent provided by law*, in its administration and regulation related to the
15 management of the public right-of-way provided that any such exercise
16 must be competitively neutral and may not be unreasonable or
17 discriminatory. Nothing herein shall be construed to limit the authority of
18 ~~cities~~ *a municipality* to require a competitive infrastructure provider to
19 enter into a contract franchise ordinance.

20 (e) The ~~city~~ *municipality* shall have the authority to prohibit the use
21 or occupation of a specific portion of public right-of-way by a provider
22 due to a reasonable public interest necessitated by public health, safety and
23 welfare so long as the authority is exercised in a competitively neutral
24 manner and is not unreasonable or discriminatory. A reasonable public
25 interest shall include the following:

26 (1) The prohibition is based upon a recommendation of the ~~city~~
27 *municipality* engineer, is related to public health, safety and welfare and is
28 nondiscriminatory among providers, including incumbent providers;

29 (2) the provider has rejected a reasonable, competitively neutral and
30 nondiscriminatory justification offered by the ~~city~~ *municipality* for
31 requiring an alternate method or alternate route that will result in neither
32 unreasonable additional installation expense nor a diminution of service
33 quality;

34 (3) the ~~city~~ *municipality* reasonably determines, after affording the
35 provider reasonable notice and an opportunity to be heard, that a denial is
36 necessary to protect the public health and safety and is imposed on a
37 competitively neutral and nondiscriminatory basis; or

38 (4) the specific portion of the public right-of-way for which the
39 provider seeks use and occupancy is environmentally sensitive as defined
40 by state or federal law or lies within a previously designated historic
41 district as defined by local, state or federal law.

42 (f) A provider's request to use or occupy a specific portion of the
43 public right-of-way shall not be denied without reasonable notice and an

1 opportunity for a public hearing before the ~~city~~ governing body of the
2 *municipality*. A ~~city~~ governing body's denial of a provider's request to use
3 or occupy a specific portion of the public right-of-way may be appealed to
4 a district court.

5 (g) A provider shall comply with all laws and rules and regulations
6 governing the use of public right-of-way.

7 (h) A ~~city~~ *municipality* may not impose the following regulations on
8 providers:

9 (1) Requirements that particular business offices or other
10 telecommunications facilities be located in the ~~city~~ *municipality*;

11 (2) requirements for filing applications, reports and documents that
12 are not reasonably related to the use of a public right-of-way or this act;

13 (3) requirements for ~~city~~ *municipality* approval of transfers of
14 ownership or control of the business or assets of a provider's business,
15 except that a ~~city~~ *municipality* may require that such entity maintain
16 current point of contact information and provide notice of a transfer within
17 a reasonable time; and

18 (4) requirements concerning the provisioning of or quality of
19 customer services, facilities, equipment or goods in-kind for use by the
20 ~~city~~ *municipality*, political subdivision or any other provider or public
21 utility.

22 (i) Unless otherwise required by state law, in the exercise of its lawful
23 regulatory authority, a ~~city~~ *municipality* shall promptly, and in no event
24 more than 30 days, with respect to facilities in the public right-of-way,
25 process each valid and administratively complete application of a provider
26 for any permit, license or consent to excavate, set poles, locate lines,
27 construct facilities, make repairs, effect traffic flow, obtain zoning or
28 subdivision regulation approvals, or for other similar approvals, and shall
29 make reasonable effort not to unreasonably delay or burden that provider
30 in the timely conduct of its business. The ~~city~~ *municipality* shall use its
31 best reasonable efforts to assist the provider in obtaining all such permits,
32 licenses and other consents in an expeditious and timely manner.

33 (j) If there is an emergency necessitating response work or repair, a
34 provider may begin that repair or emergency response work or take any
35 action required under the circumstances, provided that the provider
36 notifies the affected ~~city~~ *municipality* promptly after beginning the work
37 and timely thereafter meets any permit or other requirement had there not
38 been such an emergency.

39 (k) A ~~city~~ *municipality* may require a provider to repair all damage to
40 a public right-of-way caused by the activities of that provider, or of any
41 agent affiliate, employee, or subcontractor of that provider, while
42 occupying, installing, repairing or maintaining facilities in a public right-
43 of-way and to return the right-of-way to its functional equivalence before

1 the damage pursuant to the reasonable requirements and specifications of
 2 the ~~city~~ municipality. If the provider fails to make the repairs required by
 3 the ~~city~~ municipality, the ~~city~~ municipality may effect those repairs and
 4 charge the provider the cost of those repairs. If a ~~city~~ municipality incurs
 5 damages as a result of a violation of this subsection, then the ~~city~~
 6 municipality shall have a cause of action against a provider for violation of
 7 this subsection; and may recover its damages, including reasonable
 8 attorney fees, if the provider is found liable by a court of competent
 9 jurisdiction.

(1)

10 (l) If requested by a ~~city~~ municipality, in order to accomplish
 11 construction and maintenance activities directly related to improvements
 12 for the health, safety and welfare of the public, a provider shall promptly
 13 remove its facilities from the public right-of-way or shall relocate or adjust
 14 its facilities within the public right-of-way at no cost to the ~~political~~
 15 ~~subdivision~~ municipality. Such relocation or adjustment shall be completed
 16 as soon as reasonably possible within the time set forth in any request by
 17 the ~~city~~ municipality for such relocation or adjustment. Any damages
 18 suffered by the ~~city~~ municipality or its contractors as a result of such
 19 provider's failure to timely relocate or adjust its facilities shall be borne by
 20 such provider.

except that a municipality shall give a provider a minimum of 180 days advance written notice to comply with any such request for removal, relocation or adjustment.

21 (m) No ~~city~~ municipality shall create, enact or erect any unreasonable
 22 condition, requirement or barrier for entry into or use of the public rights-
 23 of-way by a provider.

24 (n) A ~~city~~ municipality may assess any of the following fees against a
 25 provider, for use and occupancy of the public right-of-way, provided that
 26 such fees reimburse the ~~city~~ municipality for its reasonable, actual and
 27 verifiable costs of managing the ~~city~~ public right-of-way; and are imposed
 28 on all such providers in a nondiscriminatory and competitively neutral
 29 manner:

30 (1) A permit fee in connection with issuing each construction permit
 31 to set fixtures in the public right-of-way within that ~~city~~ municipality as
 32 provided in K.S.A. 17-1901, and amendments thereto, to compensate the
 33 ~~city~~ municipality for issuing, processing and verifying the permit
 34 application;

35 (2) an excavation fee for each street or pavement cut to recover the
 36 costs associated with construction and repair activity of the provider, their
 37 assigns, contractors or subcontractors, or both, with the exception of
 38 construction and repair activity required pursuant to subsection (l) of this
 39 ~~act~~ related to construction and maintenance activities directly related to
 40 improvements for the health, safety and welfare of the public; ~~provided,~~
 41 ~~however,~~ Imposition of such excavation fee ~~must~~ shall be based upon a
 42 regional specific or other appropriate study establishing the basis for such
 43 costs which takes into account the life of the ~~city~~ street prior to the

(2) When a municipality requests removal, relocation or adjustment of a provider's facilities within the public right-of-way for construction or maintenance activities related to improvements that are in whole or in part, for private benefit, the municipality shall require, as a condition of its approval of any request from any private party or parties for alteration of the public right-of-way, that such private party or parties reimburse a provider for the cost of removal, relocation or adjustment, in an amount equal to the percentage of the private benefit received. A provider shall not be obligated to commence the removal, relocation or adjustment until receipt of funds for the costs from such private party or parties. For purposes of this section, a mixed purpose public and private project shall be subject to a presumption of a private benefit of no less than 50%. A provider shall not be held liable for any delay caused by a private party's failure to reimburse such costs. A municipality shall have no obligation to collect any such reimbursement for a provider.

1 construction or repair activity and the remaining life of the ~~city~~ street.
2 Such excavation fee is expressly limited to activity that results in an actual
3 street or pavement cut;

4 (3) inspection fees to recover all reasonable costs associated with ~~city~~
5 *a municipality's* inspection of the work of the provider in the right-of-way;

6 (4) repair and restoration costs associated with repairing and restoring
7 the public right-of-way because of damage caused by the provider, its
8 assigns, contractors or subcontractors, or both, in the right-of-way; and

9 (5) a performance bond, in a form acceptable to the ~~city~~ *municipality*,
10 from a surety licensed to conduct surety business in the state of Kansas,
11 insuring appropriate and timely performance in the construction and
12 maintenance of facilities located in the public right-of-way.

13 (o) A ~~city~~ *may municipality shall* not assess any additional fees
14 against providers for use or occupancy of the public right-of-way other
15 than those specified in subsection (n).

16 (p) This act ~~may~~ *shall* not be construed to affect any valid taxation of
17 a provider's facilities or services.

18 (q) Providers shall indemnify and hold the ~~city~~ *municipality* and its
19 officers and employees harmless against any and all claims, lawsuits,
20 judgments, costs, liens, losses, expenses, fees to include reasonable
21 attorney fees and costs of defense, proceedings, actions, demands, causes
22 of action, liability and suits of any kind and nature, including personal or
23 bodily injury or death, property damage or other harm for which recovery
24 of damages is sought, to the extent that it is found by a court of competent
25 jurisdiction to be caused by the negligence of the provider, any agent,
26 officer, director, representative, employee, affiliate or subcontractor of the
27 provider, or their respective officers, agents, employees, directors or
28 representatives, while installing, repairing or maintaining facilities in a
29 public right-of-way. The indemnity provided by this subsection does not
30 apply to any liability resulting from the negligence of the ~~city~~ *municipality*,
31 its officers, employees, contractors or subcontractors. If a provider and the
32 ~~city~~ *municipality* are found jointly liable by a court of competent
33 jurisdiction, liability shall be apportioned comparatively in accordance
34 with the laws of this state without, ~~however~~, waiving any governmental
35 immunity available to the ~~city~~ *municipality* under state law and without
36 waiving any defenses of the parties under state or federal law. This section
37 is solely for the benefit of the ~~city~~ *municipality* and provider and does not
38 create or grant any rights, contractual or otherwise, to any other person or
39 entity.

40 (r) A provider or ~~city~~ *municipality* shall promptly advise the other in
41 writing of any known claim or demand against the provider or the ~~city~~
42 *municipality* related to or arising out of the provider's activities in a public
43 right-of-way.

- 1 (s) Nothing contained in ~~K.S.A. 17-1902, and amendments thereto,~~
2 *this section* is intended to affect the validity of any franchise fees collected
3 pursuant to state law or ~~a city's~~ *the* home rule authority *of the municipality*.
- 4 (t) Any ordinance enacted prior to the effective date of this act
5 governing the use and occupancy of the public right-of-way by a provider
6 shall not conflict with the provisions of this act.
- 7 Sec. 2. K.S.A. 2022 Supp. 17-1902 is hereby repealed.
- 8 Sec. 3. This act shall take effect and be in force from and after its
9 publication in the statute book.