

By: King of Parker

H.B. No. 3179

Substitute the following for H.B. No. 3179:

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C.S.H.B. No. 3179

A BILL TO BE ENTITLED

AN ACT

relating to the promotion of fair competition and intermodal parity among communications service providers, including municipal and state authority with regard to providers.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle C, Title 2, Utilities Code, is amended by adding Chapter 65 to read as follows:

CHAPTER 65. STATEWIDE CABLE AND VIDEO FRANCHISE

Sec. 65.001. DEFINITIONS. In this chapter:

(1) "Cable service" is defined as set forth in 47 U.S.C. Section 522(6).

(2) "Cable service provider" means a person who provides cable service.

(3) "Certificated provider" means a person who has been issued a certificate under Chapter 54.

(4) "Communications facility" means the equipment and components of a communications network provider, and includes the property owned, operated, or controlled in connection with the provider's business operations.

(5) "Communications network" means a component or facility that is, in whole or in part, physically located within a public right-of-way and that is used to provide video programming, cable, voice, or data services.

(6) "Communications service" means the transmission,

1 conveyance, or routing of a cable service or video programming as  
2 defined in this chapter, voice service, or data service by or  
3 through any communications network regardless of the protocol used  
4 for such transmission or conveyance.

5 (7) "Communications service provider" means a person  
6 or group of persons engaged in the provision of communications  
7 services, without regard to ownership of a communications network.

8 (8) "Franchise" means an initial authorization, or  
9 renewal of an authorization, issued by a franchising authority,  
10 regardless of whether the authorization is designated as a  
11 franchise, permit, license, resolution, contract, certificate,  
12 agreement, or otherwise, that authorizes the construction and  
13 operation of a communications network in the public rights-of-way.

14 (9) "Franchise fee" means the amount of compensation  
15 paid to a franchising authority by a franchisee under the terms of  
16 the franchise.

17 (10) "Franchisee" means a communications service  
18 provider that has been granted a franchise.

19 (11) "Public right-of-way" means the area on, below,  
20 or above a public roadway, highway, street, public sidewalk, alley,  
21 waterway, or utility easement in which a municipality has an  
22 interest.

23 (12) "Video programming" means programming provided  
24 by, or generally considered comparable to programming provided by,  
25 a television broadcast station, as set forth in 47 U.S.C. Section  
26 522(20).

27 (13) "Video service" means video programming services

1 provided through wireline facilities located at least in part in  
2 the public right-of-way without regard to delivery technology,  
3 including Internet protocol technology. This definition does not  
4 include any video service provided by a commercial mobile service  
5 provider as defined in 47 U.S.C. Section 332(d).

6 (14) "Video service provider" means a video  
7 programming distributor that distributes video programming  
8 services through wireline facilities located at least in part in  
9 the public right-of-way without regard to delivery technology.  
10 This term does not include a cable service provider.

11 (15) "Voice service" means voice communications  
12 services provided through wireline facilities located at least in  
13 part in the public right-of-way, without regard to the delivery  
14 technology, including Internet protocol technology.

15 Sec. 65.002. STATE AUTHORIZATION TO PROVIDE CABLE OR VIDEO  
16 SERVICE. (a) Any entity or person seeking to provide cable or  
17 video service in this state shall file an application for a state  
18 franchise with the secretary of state as required by this section.

19 (b) The secretary of state shall issue a certificate of  
20 franchise authority to offer cable or video service within this  
21 state upon receiving from the applicant an affidavit signed by an  
22 officer or general partner of the applicant entity affirming the  
23 following representations and information:

24 (1) that, if applicable, the applicant has filed or  
25 will timely file with the Federal Communications Commission all  
26 forms required by that agency in advance of offering cable service;

27 (2) that the applicant agrees to comply with all

1 applicable federal and state statutes and regulations;

2 (3) a description of the geographic areas to be served  
3 by the applicant, which may include unincorporated areas, which  
4 description shall be promptly updated by the applicant if service  
5 is expanded to a previously undesignated geographic area; and

6 (4) the location of the principal place of business  
7 and the names of the principal executive officers of the applicant.

8 (c) The certificate of franchise authority issued by the  
9 secretary of state shall contain the following:

10 (1) a grant of authority to provide cable or video  
11 service as requested in the application;

12 (2) a grant of authority to use and occupy the public  
13 rights-of-way in the delivery of that service, subject to the laws  
14 of this state, including the police powers of the municipalities in  
15 which the service is delivered; and

16 (3) a statement that the grant of authority is subject  
17 to lawful operation of the cable or video service by the applicant  
18 or its successor in interest.

19 (d) The certificate of franchise authority issued by the  
20 secretary of state is fully transferable to any successor in  
21 interest to the applicant to which it is initially granted. A  
22 notice of transfer shall be promptly filed with the secretary of  
23 state upon the completion of such transfer.

24 Sec. 65.003. TERMINATION OF MUNICIPAL FRANCHISE BY CABLE  
25 SERVICE PROVIDER. (a) Beginning September 1, 2005, a cable service  
26 provider may elect to terminate any municipal franchise existing on  
27 the date this chapter takes effect by providing written notice to

1 the affected municipality. The termination shall be effective as  
2 of the date the municipality receives the notice.

3 (b) A cable service provider electing to terminate an  
4 existing municipal franchise shall be responsible for remitting to  
5 the affected municipality within 90 days of the effective date of  
6 termination any accrued but unpaid franchise fees due under the  
7 franchise being terminated. If the cable service provider has  
8 credit remaining from prepaid franchise fees, the provider may  
9 deduct the amount of the remaining credit from any future fees or  
10 taxes it must pay to the municipality, either directly or through  
11 the comptroller. Any municipality receiving notice of a terminated  
12 franchise under this chapter shall retain for one year following  
13 termination the right to audit the accuracy of any payments that  
14 were made to the municipality under the terminated franchise during  
15 a period not to exceed four years prior to the termination.

16 Sec. 65.004. REQUIREMENTS APPLICABLE TO CABLE SERVICE  
17 PROVIDERS AND VIDEO SERVICE PROVIDERS. (a) Pursuant to 47 U.S.C.  
18 Section 531, a cable or video service provider that owns a  
19 communications network or that leases or otherwise uses a  
20 third-party communications network, including that of an  
21 affiliate, to deliver cable or video service within the  
22 municipality shall, not later than 120 days after a request by a  
23 municipality served by the cable or video service provider as  
24 specified in the certificate, provide where technically capable the  
25 municipality with capacity in its communications network to allow  
26 public, educational, and governmental (PEG) access channels for  
27 noncommercial programming as follows. If a municipality did not

1 have any public, educational, and governmental access channels as  
2 of September 1, 2005, then the cable or video service provider shall  
3 furnish:

4 (1) up to three PEG channels for a municipality with a  
5 population of at least 50,000; and

6 (2) up to two PEG channels for a municipality with a  
7 population of less than 50,000.

8 (b) Notwithstanding Subsection (a), the number of PEG  
9 channels required to be provided by each cable or video service  
10 provider shall not be less than the number of PEG channels a  
11 municipality has activated under the terms of any franchise,  
12 contract, or other agreement, including any channels received as of  
13 September 1, 2005, in lieu of public, educational, or governmental  
14 channels, regardless of whether the municipal franchise is  
15 terminated under this chapter. The following conditions shall  
16 apply to the provision of any PEG channels carried in accordance  
17 with this subsection or Subsection (a):

18 (1) the cable or video service provider may, at its  
19 sole discretion, place any channel utilized by a municipality on  
20 any tier of service following September 1, 2005, except that the  
21 municipality may, at its sole discretion, designate up to three PEG  
22 channels (or, in the case of a municipality with a population of  
23 less than 50,000, up to two PEG channels) utilized by the  
24 municipality, which shall remain on the lowest service tier for  
25 which no equipment is required to receive the channel; provided,  
26 however, if service is provided only in digital format, the PEG  
27 channels shall be made available in that format;

1           (2) after a cable or video service provider has  
2 commenced commercial delivery of cable or video services in a  
3 municipality and no later than 120 days after a written request from  
4 a municipality, a cable or video service provider shall, as  
5 applicable, either provide the initial access channel allowed in  
6 Subsection (a) if a municipality did not have any PEG channels as of  
7 September 1, 2005, or shall continue to provide the channels in  
8 service as of September 1, 2005, subject to the terms of this  
9 section. In the event a municipality has not utilized the minimum  
10 number of access channels as permitted in Subsection (a), access to  
11 the additional channel capacity allowed in Subsection (a) shall be  
12 provided upon 90 days' written notice if the municipality meets the  
13 following standard. If a municipality has one active PEG channel  
14 and wishes to activate an additional PEG channel, the initial  
15 channel shall be considered to be substantially utilized when 12  
16 hours are programmed on that channel each calendar day. In  
17 addition, at least 40 percent of the 12 hours of programming for  
18 each business day on average over each calendar quarter must be  
19 nonrepeat programming. Nonrepeat programming shall include the  
20 first three video-castings of a program. If a municipality is  
21 entitled to three PEG channels under Subsection (a) and has in  
22 service two active PEG channels, each of the two active channels  
23 shall be considered to be substantially utilized when 12 hours are  
24 programmed on each channel each calendar day and at least 50 percent  
25 of the 12 hours of programming for each business day on average over  
26 each calendar quarter is nonrepeat programming for three  
27 consecutive calendar quarters;

1           (3) a municipality shall bear the cost of any  
2 construction required to establish a connection between a  
3 municipality's origination point and the cable or video service  
4 provider's communication network;

5           (4) the operation of any PEG channel provided pursuant  
6 to this section shall be the responsibility of the municipality  
7 receiving the benefit of such channel, and the cable or video  
8 service provider shall have no obligation to operate such channel  
9 other than the transmission of such channel; and

10           (5) any PEG channel provided pursuant to this section  
11 that is not utilized by the municipality for at least eight hours a  
12 day shall no longer be made available to the municipality, but may  
13 be programmed at the cable or video service provider's discretion.  
14 At such time as the municipality can certify to the cable or video  
15 service provider a schedule for at least eight hours of daily  
16 programming, the cable or video service provider shall restore the  
17 previously lost channel but shall be under no obligation to carry  
18 that channel on a basic or analog tier.

19           (c) The requirements of Subsections (a) and (b) shall apply  
20 equally to all cable or video service providers that own a  
21 communications network or lease or otherwise use a third-party  
22 communications network, including that of an affiliate, to deliver  
23 cable or video service within a municipality.

24           (d) Only a municipality may seek enforcement of the  
25 requirements of Subsections (a), (b), and (c) by initiating a  
26 proceeding with a court of competent jurisdiction.

27           (e) It is the sole responsibility of the municipality to



1 ensure that any and all transmissions, content, or programming to  
2 be transmitted over a channel or facility are provided or submitted  
3 to the cable or video service provider in a manner or form that is  
4 capable of being accepted and transmitted by a provider, without  
5 requirement for additional alteration or change in content by the  
6 provider, over the particular network of the cable or video service  
7 provider, which is compatible with the technology or protocol  
8 utilized by the cable or video service provider to deliver  
9 services.

10 (f) Consistent with 47 U.S.C. Section 541(a)(3), a cable or  
11 video service provider may not deny access to service to any group  
12 of potential residential subscribers because of the income of the  
13 residents of the local area in which such group resides. A provider  
14 may satisfy the requirements of this subsection through the use of  
15 an alternative technology notwithstanding differences in the  
16 specific content or functionality provided.

17 (g) An affected person may seek enforcement of the  
18 requirement described in Subsection (f) by initiating a proceeding  
19 with a court of competent jurisdiction. A municipality within  
20 which the potential residential video subscribers referenced in  
21 Subsection (f) reside shall be an affected person for purposes of  
22 this section.

23 (h) A cable or video service provider shall comply with  
24 customer service requirements consistent with 47 C.F.R. Section  
25 76.309(c) until there are more than two providers offering service  
26 including direct-to-home satellite service in the affected area.

27 (i) This state or a political subdivision shall not require

1 a mandatory build out on either a cable or video service provider  
2 except as specifically required by federal law.

3 (j) Should a cable or video service provider be found by a  
4 court of competent jurisdiction to be in noncompliance with the  
5 requirements of this section, the court shall order such provider,  
6 within a reasonable period of time, to cure such noncompliance.  
7 Failure to comply shall subject the provider to such penalties as  
8 the court shall reasonably impose, up to and including revocation  
9 of any state franchise granted under this chapter. A municipality  
10 within which the provider offers video service shall be an  
11 appropriate party in any such litigation.

12 (k) A municipality may not prefer or give advantage to any  
13 cable or video service provider operating under a state franchise  
14 or discriminate against any cable or video service provider  
15 operating under a state franchise in any manner in the requirements  
16 provided in this subsection. Any requirements shall be uniformly  
17 applied, by ordinance, to all cable or video service providers  
18 operating under a state franchise within the municipality. A  
19 municipality's authority to regulate the activities of a cable or  
20 video service provider is limited to the requirements imposed on a  
21 cable or video service provider operating under a state franchise  
22 by this subsection. Specifically, a municipality is authorized to  
23 impose by ordinance a requirement:

24 (1) to require that a communications service provider  
25 that is providing cable or video service within the municipality  
26 register with the municipality and maintain a point of contact;

27 (2) to establish reasonable guidelines regarding the

1 use of the public, educational, and governmental access channels;  
2 and

3 (3) to submit reports within 30 days on the customer  
4 service standards referenced in Subsection (h) if the provider is  
5 subject to those standards and has continued and unresolved  
6 customer service complaints indicating a clear failure on the part  
7 of the provider to comply with the standards. If the reports are  
8 not provided or are incomplete, or if they verify noncompliance,  
9 then the municipality, after providing appropriate due process and  
10 a right to be heard, may file an appropriate proceeding in the  
11 municipal court.

12 (1) Nothing in this section prohibits a municipality from  
13 exercising its nondiscriminatory police power under Section 66.003  
14 with respect to a communications service provider's use of the  
15 public rights-of-way. A court of competent jurisdiction shall have  
16 jurisdiction to enforce and determine the lawfulness of any  
17 ordinance adopted by a municipality under this section.

18 (m) Except as provided in this chapter, a municipality may  
19 not require any monetary compensation, nonmonetary compensation,  
20 facilities, value, in-kind support, free service, or other thing of  
21 value for the right or privilege of a cable provider or video  
22 service provider to provide service or to occupy or use a public  
23 right-of-way.

24 (n) A cable or video service provider electing to terminate  
25 an existing municipal franchise or initiating service after  
26 September 1, 2005, shall pay each municipality in which it provides  
27 service a fee equal to five percent of the provider's gross

1 revenues.

2 (o) For purposes of this section, "gross revenues" means:

3 (1) all consideration of any kind or nature, including  
4 without limitation cash, credits, property, and in-kind  
5 contributions (services or goods) derived by the provider from the  
6 operation of the provider's system to provide cable or video  
7 service within the municipality;

8 (2) all fees charged to subscribers for any and all  
9 cable or video service provided by the provider, and compensation  
10 received by the provider or its affiliates that is derived from the  
11 operation of the provider's system to provide cable or video  
12 service with respect to commissions that are paid to the provider as  
13 compensation for promotion or exhibition of any products or  
14 services on its system, such as a "home shopping" or a similar  
15 channel, subject to Subsection (p)(5); and

16 (3) a pro rata portion of all revenue derived by the  
17 cable or video provider or its affiliates pursuant to compensation  
18 arrangements for advertising derived from the operation of the  
19 provider's system to provide cable or video service within the  
20 municipality, subject to Subsection (p)(3). The allocation shall  
21 be based on the number of subscribers in the municipality divided by  
22 the total number of subscribers in relation to the relevant  
23 regional or national compensation arrangement.

24 (p) For purposes of this section, "gross revenues" does not  
25 include:

26 (1) revenues not actually received, even if billed,  
27 such as bad debt;

1           (2) revenues received by any affiliate or any other  
2 person in exchange for supplying goods or services used by the  
3 provider to provide cable or video service;

4           (3) refunds, rebates, or discounts made to  
5 subscribers, leased access providers, advertisers, or the  
6 municipality;

7           (4) any revenues from services classified as non-cable  
8 or non-video service under federal or state law, including without  
9 limitation revenue received from telecommunications services,  
10 revenue received from information services, and any other revenues  
11 attributed by the provider to non-cable or non-video service in  
12 accordance with commission or Federal Communications Commission  
13 rules, regulations, standards, or orders;

14           (5) any revenue paid by subscribers to home shopping  
15 programmers directly from the sale of merchandise through any home  
16 shopping channel offered as part of the cable or video service;

17           (6) the sale of cable or video service for resale in  
18 which the purchaser is required to collect the five percent fee from  
19 the purchaser's customer;

20           (7) any tax of general applicability imposed upon the  
21 provider or upon subscribers by a city, state, federal, or any other  
22 governmental entity and required to be collected by the provider  
23 and remitted to the taxing entity, including, but not limited to,  
24 sales and use tax, gross receipts tax, excise tax, utility users  
25 tax, public service tax, and communication taxes;

26           (8) the provision of cable service to customers at no  
27 charge as required or allowed by a municipality, including without

1 limitation the provision of cable service to public institutions,  
2 public schools, or governmental entities;

3 (9) any foregone revenue from the provider's provision  
4 of free or reduced-cost cable service to any person, including  
5 without limitation the municipality and other public institutions  
6 or other institutions;

7 (10) sales of capital assets or sales of surplus  
8 equipment;

9 (11) reimbursement by programmers of marketing costs  
10 incurred by the provider for the introduction of new programming;  
11 or

12 (12) directory or Internet advertising revenue  
13 including, but not limited to, yellow page, white page, banner  
14 advertisement, and electronic publishing.

15 (g) The fee payable under this section is to be paid to the  
16 municipality quarterly, 45 days after the end of the quarter. Each  
17 payment shall be accompanied by a summary as to the basis for the  
18 calculation of the fee. A municipality may review the business  
19 records of the cable provider or video service provider to the  
20 extent necessary to ensure compensation in accordance with this  
21 chapter. Each party shall bear the party's own costs of the  
22 examination. The municipality may, in the event of a dispute as to  
23 proper compensation under this chapter, bring an action in a court  
24 of competent jurisdiction.

25 (r) For purposes of this section, a provider's system shall  
26 consist solely of the optical spectrum wavelength(s), bandwidth, or  
27 other current or future technological capacity used for the

1 transmission of video programming over wireline directly to  
2 subscribers within the geographic area within the municipality as  
3 designated by the provider in its franchise.

4 (s) A municipality may not require a cable service provider  
5 or video service provider to pay the municipality any fee or  
6 assessment, including any application, permit, excavation, or  
7 inspection fee or any fee for the support of public, educational, or  
8 governmental access channels. This subsection does not preclude  
9 the assessment of generally applicable taxes or fees.

10 (t) A cable service provider or a video service provider may  
11 recover from the provider's customers the fee imposed by this  
12 chapter.

13 (u) Notwithstanding that a municipal cable franchise may be  
14 terminated pursuant to Section 65.003, the following services shall  
15 continue to be provided by the cable provider that was furnishing  
16 services pursuant to its terminated franchise until 2008 or until  
17 the term of the franchise was to expire, whichever is sooner:

18 (1) institutional network capacity, however defined  
19 or referred to in the municipal cable franchise, but generally  
20 referring to a private line data network capacity for use by the  
21 municipality for noncommercial purposes, shall continue to be  
22 provided at the same capacity as was provided to the municipality  
23 prior to the date of the termination, provided that the  
24 municipality will compensate the provider at its actual incremental  
25 cost for such capacity. For purposes of this section, "actual  
26 incremental cost" shall mean only current out-of-pocket expenses  
27 for labor, equipment repair or replacement, or any tax expenses

1 directly associated with such labor or equipment of the video  
2 service provider necessarily and directly used for the provision of  
3 what, under a superseded franchise, were in-kind services,  
4 exclusive of any profit or overhead such as, without limitation,  
5 any depreciation, amortization, or administrative expenses; and

6 (2) cable services to community public buildings, such  
7 as municipal buildings and public schools, shall continue to be  
8 provided to the same extent provided immediately prior to the date  
9 of the termination. Such cable service generally refers to the  
10 existing cable drop connections to such facilities and the tier of  
11 cable service provided pursuant to the franchise at the time of the  
12 termination.

13 Sec. 65.005. APPLICABILITY OF OTHER LAWS. Nothing herein  
14 shall be interpreted to prevent a voice provider, cable service  
15 provider or video service provider, or municipality from seeking  
16 clarification of its rights and obligations under federal law or to  
17 exercise any right or authority under federal or state law.

18 SECTION 2. Subtitle C, Title 2, Utilities Code, is amended  
19 by adding Chapter 66 to read as follows:

20 CHAPTER 66. MUNICIPAL POWERS AND DUTIES

21 Sec. 66.001. DEFINITIONS. The definitions contained in  
22 Chapter 65 apply to this chapter.

23 Sec. 66.002. NONDISCRIMINATION BY MUNICIPALITY. (a) A  
24 municipality shall allow a communications service provider to  
25 install, construct, and maintain a communications network within a  
26 public right-of-way and shall provide the communications service  
27 provider with open, comparable, nondiscriminatory, and



1 competitively neutral access to the public right-of-way. All use  
2 of a public right-of-way by the communications service provider is  
3 nonexclusive and subject to Section 66.003.

4 (b) A municipality may not discriminate against a  
5 communications service provider regarding:

6 (1) the authorization or placement of a communications  
7 network in a public right-of-way;

8 (2) access to a building; or

9 (3) a municipal utility pole attachment term.

10 (c) A municipally owned utility may not charge a pole  
11 attachment rate or underground conduit rate that exceeds the fee  
12 the utility would be permitted to charge if the utility's rates were  
13 regulated under 47 U.S.C. Section 224(e) and the rules of the  
14 Federal Communications Commission adopted thereunder; provided,  
15 further, that such municipally owned utility shall charge a single,  
16 uniform pole attachment fee to all attaching entities not owned by  
17 the municipality or municipally owned utility regardless of the  
18 services carried over the networks attached to the poles or  
19 underground conduit.

20 Sec. 66.003. MUNICIPAL POLICE POWER; OTHER AUTHORITY. (a)  
21 A municipality may enforce police power-based regulations in the  
22 management of a public right-of-way that apply to all persons  
23 within the municipality. A municipality may enforce police  
24 power-based regulations in the management of the activities of a  
25 communications service provider to the extent that they are  
26 reasonably necessary to protect the health, safety, and welfare of  
27 the public. Police power-based regulation of a communications

1 service provider's use of the public right-of-way must be  
2 competitively neutral and may not be unreasonable or  
3 discriminatory. A municipality may not impose the following  
4 regulations on activities of a communications service provider,  
5 including:

6 (1) requirements that particular business offices be  
7 located in the municipality;

8 (2) requirements for the filing of reports and  
9 documents with the municipality that are not required by state or  
10 federal law and that are not related to the use of the public  
11 right-of-way; provided, however, that a municipality may request  
12 maps and records maintained in the ordinary course of business for  
13 purposes of locating the portions of a communications network that  
14 occupy public rights-of-way. Any maps or records of the location of  
15 a communications network received by a municipality shall be  
16 confidential and exempt from disclosure under Chapter 552,  
17 Government Code, and may be used by a municipality only for the  
18 purpose of planning and managing construction activity in the  
19 public right-of-way; however, in no event shall a municipality  
20 request information as to the capacity or technical configuration  
21 of the provider's facilities;

22 (3) the inspection of a communications service  
23 provider's business records;

24 (4) the approval of transfers of ownership or control  
25 of a communications service provider's business, except that a  
26 municipality may require that a communications service provider  
27 maintain a current point of contact and provide notice of a transfer

1 within a reasonable time; or

2 (5) requirements that a provider that is self-insured  
3 under the provisions of state law obtain insurance or bonding for  
4 any activities within the municipality, except that such providers  
5 are required to provide substantially the same defense and claims  
6 processing as an insured provider; further, no bond shall be  
7 required from a provider for any work consisting of aerial  
8 construction; however, reasonable bonds may be required of  
9 providers that cannot demonstrate a record of at least four years'  
10 performance of work in any municipal public right-of-way free of  
11 currently unsatisfied claims by a municipality for damage to the  
12 right-of-way.

13 (b) Notwithstanding any other law, a municipality may  
14 require the issuance of a construction permit, without cost, to a  
15 communications service provider that is locating facilities in or  
16 on a public right-of-way within the municipality. The terms of the  
17 permit shall be consistent with construction permits issued to  
18 other persons excavating in a public right-of-way.

19 (c) In the exercise of its lawful regulatory authority, a  
20 municipality shall promptly process all valid and administratively  
21 complete applications of a communications service provider for a  
22 permit, license, or consent to excavate, set poles, locate lines,  
23 construct facilities, make repairs, affect traffic flow, or obtain  
24 zoning or subdivision regulation approvals or other similar  
25 approvals and shall make every reasonable effort to not delay or  
26 unduly burden the provider in the timely conduct of its business.

27 (d) If there is an emergency necessitating response work or

1 repair, a communications service provider may begin the repair or  
2 emergency response work or take any action required under the  
3 circumstances without prior approval from the affected  
4 municipality, if the communications service provider notifies the  
5 municipality as promptly as possible after beginning the work and  
6 later obtains any approval required by a municipal ordinance  
7 applicable to emergency response work.

8 Sec. 66.004. INDEMNITY IN CONNECTION WITH RIGHT-OF-WAY;  
9 NOTICE OF LIABILITY. (a) A communications service provider shall  
10 indemnify and hold a municipality and its officers and employees  
11 harmless against any and all claims, lawsuits, judgments, costs,  
12 liens, losses, expenses, fees (including reasonable attorney's  
13 fees and costs of defense), proceedings, actions, demands, causes  
14 of action, liability, and suits of any kind and nature, including  
15 personal or bodily injury (including death), property damage, or  
16 other harm for which recovery of damages is sought, that is found by  
17 a court of competent jurisdiction to be caused solely by the  
18 negligent act, error, or omission of the communications service  
19 provider, any agent, officer, director, representative, employee,  
20 affiliate, or subcontractor of the communications service  
21 provider, or their respective officers, agents, employees,  
22 directors, or representatives, while installing, repairing, or  
23 maintaining facilities in a public right-of-way. The indemnity  
24 provided by this subsection does not apply to any liability  
25 resulting from the negligence of the municipality or its officers,  
26 employees, contractors, or subcontractors. If a communications  
27 service provider and the municipality are found jointly liable by a

1 court of competent jurisdiction, liability shall be apportioned  
2 comparatively in accordance with the laws of this state without,  
3 however, waiving any governmental immunity available to the  
4 municipality under state law and without waiving any defenses of  
5 the parties under state law. This subsection is solely for the  
6 benefit of the municipality and the communications service provider  
7 and does not create or grant any rights, contractual or otherwise,  
8 for or to any other person or entity.

9 (b) A communications service provider and a municipality  
10 shall promptly advise the other in writing of any known claim or  
11 demand against the communications service provider or the  
12 municipality related to or arising out of the communications  
13 service provider's activities in a public right-of-way.

14 SECTION 3. Subtitle C, Title 2, Utilities Code, is amended  
15 by adding Chapter 68 to read as follows:

16 CHAPTER 68. PLACEMENT AND MOVEMENT OF COMMUNICATIONS FACILITIES

17 AND COMPENSATION FOR USE OF THE PUBLIC RIGHT-OF-WAY

18 SUBCHAPTER A. GENERAL PROVISIONS

19 Sec. 68.001. POLICY. (a) Convergence of technologies in  
20 the communications industry requires that existing compensation  
21 structures be conformed to ensure that communication providers and  
22 municipalities are treated fairly with respect to placing and  
23 maintaining facilities in the right-of-way.

24 (b) It is the policy of this state to:

25 (1) ensure that communication providers have  
26 reasonable access to the public rights-of-way;

27 (2) ensure that improvements in municipal

1 infrastructure are made in a timely and efficient manner;

2 (3) provide a funding mechanism for facility  
3 relocations that is cost-based, uniform, consistent, and  
4 efficient; and

5 (4) ensure that municipalities are fairly compensated  
6 for use of public rights-of-way.

7 SUBCHAPTER B. LOCAL AUTHORITY TO ENSURE TIMELY INFRASTRUCTURE

8 IMPROVEMENT AND RELOCATION OF FACILITIES

9 Sec. 68.101. RELOCATION OF COMMUNICATIONS FACILITY LOCATED  
10 IN PUBLIC RIGHT-OF-WAY. (a) In this chapter:

11 (1) "Communications facility" means the equipment and  
12 components of a communications network provider and includes the  
13 property owned, operated, or controlled in connection with the  
14 provider's business operations.

15 (2) "Communications network provider" means any  
16 entity that provides voice, video, telephone, telegraph,  
17 communications, cable, information, broadband, or another form of  
18 advanced telecommunications services using communications  
19 facilities in the public right-of-way.

20 (3) "Public improvement project" means a construction  
21 or improvement activity in a public right-of-way undertaken by or  
22 on behalf of a municipality or in conjunction with another entity  
23 for any public purpose, other than a construction or improvement  
24 activity undertaken solely for beautification purposes.

25 (4) "Public right-of-way" means the area on, below, or  
26 above a public roadway, highway, street, public sidewalk, alley,  
27 waterway, or utility easement in which the municipality has an

1 interest.

2 (b) A municipality must consider in its design of public  
3 improvement projects a design that minimizes the relocation of any  
4 communications facility. If a municipality determines during the  
5 design of a public improvement project that, based on available  
6 information, the relocation of any portion of a communications  
7 facility may be necessary, the municipality shall provide the  
8 communications network provider:

9 (1) written notice of the planned public improvement  
10 project at a point in the design stage that allows the  
11 communications network provider sufficient time to offer planning  
12 and design alternatives; and

13 (2) plans and drawings of the project that are  
14 sufficient to enable the communications network provider to develop  
15 plans for and determine the cost of the necessary relocation.

16 (c) After providing information pursuant to Sections (b)(1)  
17 and (2), a municipality may request a communications network  
18 provider to provide the municipality information concerning the  
19 provider's facility location. The communications network provider  
20 shall provide the information requested within a reasonable time,  
21 not to exceed 15 business days. After the municipality and the  
22 provider have exchanged information regarding the design and  
23 facility location, the municipality shall convene a meeting to give  
24 the provider an opportunity to discuss potential design  
25 alternatives that may avoid facility relocation or minimize  
26 relocation costs. This meeting shall be held in person unless both  
27 parties mutually agree to conduct the meeting telephonically. A

1 municipality shall consider all reasonable and economically  
2 feasible alternatives and shall provide, in writing, reasons for a  
3 decision to reject such alternatives.

4 (d)(1) Notwithstanding any other provision of law, the  
5 governing body of a municipality may require a communications  
6 network provider to relocate the provider's facility that is  
7 located in a public right-of-way to accommodate a public  
8 improvement project. Costs related to such relocation, including  
9 the cost of installing the facilities in a new location, or new  
10 locations, and the cost of any lands, or any rights or interests in  
11 lands, and any other rights acquired to accomplish the relocation  
12 or removal, shall be at the municipality's sole expense, except  
13 that a communications network provider shall bear the cost and  
14 expense of relocating its communications facilities when the  
15 relocation is caused by the widening or straightening of a public  
16 roadway.

17 (2) A municipality may recover the costs of all  
18 relocations not paid by the communications network provider in  
19 accordance with Section 68.205.

20 (e) If a municipality has complied with Subsections (b)  
21 through (d), a communications network provider shall relocate its  
22 facility as required by the municipality if the municipality:

23 (1) gives the provider 30 days' written notice of the  
24 municipality's determination that the facility must be relocated;

25 (2) specifies the new suitable location for the  
26 facility along another area of the public right-of-way; and

27 (3) reaches an agreement with the communications



1 network provider for a reasonable time for relocating the facility,  
2 based on information presented by the affected providers regarding  
3 the length of time that is necessary to complete the relocation,  
4 that is at a minimum and not earlier than the 90th day after the date  
5 the provider receives the information required by Subdivisions (1)  
6 and (2), provided that the 90 days shall be calculated only after  
7 the 30-day notice period in Subdivision (1) has expired. The  
8 provider and the municipality shall negotiate the agreement in good  
9 faith.

10 (f) If the provider fails to comply with the requirements in  
11 Subsection (e), the municipality may relocate the facility at the  
12 sole cost and expense of the provider. A relocation by the  
13 municipality under this section shall be conducted in full  
14 compliance with applicable law, using standard equipment and  
15 construction practices compatible with the provider's existing  
16 facilities, and in a manner that minimizes disruption of provider  
17 service.

18 (g) The time for relocation established under Subsection  
19 (e)(3) shall be extended:

20 (1) by mutual agreement of the municipality and the  
21 communications network provider; or

22 (2) for any reasonable period of time that is  
23 warranted based upon generally acceptable industry standards or  
24 practices.

25 (h) The notification requirements and time limitations  
26 provided by this chapter do not apply to the relocation of a  
27 communications facility the necessity of which is discovered during

1 the construction process of a public improvement project if the  
2 relocation is directly caused by inaccurate or insufficient  
3 information provided to a municipality by a communications network  
4 provider and if the requirements of this section were met  
5 initially. In such instance, the communications network provider  
6 and the municipality shall reach an agreement to relocate such  
7 facility within a reasonable period of time based upon generally  
8 accepted industry standards or practices.

9 (i) A municipality shall make a good faith effort to obtain  
10 available third-party funding for a communications facility  
11 relocation. If any part of the public improvement project is  
12 financed with federal funds, the funds specifically allocated for  
13 communications facility relocations shall be used to pay for the  
14 relocation of the communications facility.

15 (j) If a relocation of a portion of a communications  
16 facility is necessary before the third anniversary of the certified  
17 completion date, the municipality shall pay the cost of the  
18 relocation, regardless of whether the relocation is caused by  
19 widening or straightening of a public roadway. The cost of a  
20 relocation addressed in this section shall be collected by the  
21 municipality in accordance with Section 68.205.

22 (k) This section does not limit the authority of a  
23 municipality and a communications network provider to enter into an  
24 agreement that establishes the terms for relocating a  
25 communications facility, including terms that preempt a provision  
26 of this section.

27 (l) For purposes of this section, a requirement to bury an

1 existing aerial communications facility owned by a communications  
2 network provider may not be considered to be a municipal public  
3 improvement project.

4 (m) A municipality's exercise of authority under this  
5 section must be competitively neutral, reasonable, and  
6 nondiscriminatory.

7 (n) This section supersedes any inconsistent local  
8 ordinances but does not affect a municipality's authority under an  
9 agreement, ordinance, or statute to require the relocation of  
10 another type of facility not subject to this chapter located in a  
11 public right-of-way.

12 (o) Upon completion of a project addressed by this section,  
13 the provider may submit an invoice of its costs for the relocation  
14 to the municipality. A municipality shall tender payment to the  
15 provider not later than 60 days after receiving an invoice for a  
16 project addressed by this section. The foregoing notwithstanding,  
17 the provider shall not be entitled to reimbursement for relocations  
18 caused by the widening or straightening of public roadways.

19 (p) To the extent a conflict exists between this chapter and  
20 another law relating to the relocation of a communications network  
21 provider, this chapter controls. A communications network provider  
22 operating under a municipal franchise shall be subject to the  
23 provisions of this chapter.

24 SUBCHAPTER C. ASSESSMENTS FOR RELOCATION OF FACILITIES

25 Sec. 68.201. DEFINITION. In this chapter, "linear foot"  
26 means the entire width of the right-of-way regardless of the number  
27 of aerial or underground ducts, subducts, conduits, cables, wires,

1 cabinets, pedestals, appurtenances, or other communications  
2 facilities included within the entire width of the public  
3 right-of-way, except public utility easements not adjacent to a  
4 public roadway.

5 Sec. 68.202. REQUIRED MUNICIPAL PROCEEDINGS. Within 90  
6 days of the effective date of this section and thereafter on or  
7 before September 1 of each year, each municipality that has a public  
8 improvement project planned for the next calendar year for which a  
9 communications network provider may be entitled to compensation for  
10 relocation of its facilities shall initiate a planning proceeding,  
11 in order to meet the requirements of this chapter. As part of such  
12 proceeding, the municipality shall require each communications  
13 network provider to submit the following information supported by  
14 an affidavit:

15 (1) calculations for the total amount of linear feet  
16 of public right-of-way within the municipality in which a  
17 communications facility owned or controlled by the communications  
18 network provider exists;

19 (2) forecasts for the communications network  
20 provider's costs associated with relocation, which may be based on  
21 historical data, of its communications facilities, including  
22 overhead allocation, within the municipality for the next calendar  
23 year; and

24 (3) route maps showing the general location of the  
25 communications network provider's communications facilities,  
26 provided that such information is not required to detail the exact  
27 placement of facilities, including depth, breadth, or location

1 within the right-of-way of its communications facilities.

2 Sec. 68.203. FINDINGS OF THE MUNICIPALITY. (a) After  
3 holding the initial proceedings under Section 68.202, within a  
4 reasonable period of time, the municipality shall issue its  
5 findings detailing the following:

6 (1) the total amount of linear feet currently occupied  
7 or maintained by all communications network providers operating in  
8 the municipality;

9 (2) the total amount of linear feet currently occupied  
10 or maintained by each communications network provider operating in  
11 the municipality;

12 (3) the total average amount of relocation costs  
13 projected for all communications network providers operating in the  
14 municipality for the next calendar year based on the forecasts  
15 provided by each provider, excluding widening or straightening  
16 projects;

17 (4) the per linear foot cost of facility relocation  
18 for the municipality, calculated as the total projected costs for  
19 all reimbursable facility relocations of all communications  
20 network providers for the next calendar year, divided by the total  
21 amount of linear feet occupied by all communications network  
22 providers; and

23 (5) certify the amount of actual costs expended and  
24 the variance from the fees collected for purposes of setting a fee  
25 in the next fiscal year.

26 (b) Information received by a municipality under this  
27 subchapter may only be used for the purpose set forth in this

1 subchapter and shall be exempt from public disclosure requirements  
2 under Chapter 552, Government Code.

3 Sec. 68.204. APPEAL OF MUNICIPALITY'S FINDINGS. Any  
4 communications network provider which alleges that a municipality  
5 has not followed the requirements of this chapter shall be entitled  
6 to seek enforcement in a court of competent jurisdiction.

7 Sec. 68.205. ASSESSMENTS FOR RELOCATION OF FACILITIES IN  
8 THE PUBLIC RIGHT-OF-WAY. (a) After January 1, 2006, a municipality  
9 is authorized to enact an ordinance for the collection of facility  
10 relocation fees consistent with Section 68.101(d) from each  
11 communications network provider operating in the municipality.

12 (b) A communications network provider that utilizes the  
13 public right-of-way shall pay an annual relocation fee if set by the  
14 municipality consistent with Subsection (a), based on the amount of  
15 linear feet of public right-of-way occupied by the provider's  
16 communications facilities within the municipality.

17 (c) The fee required under this chapter is based on the  
18 linear feet occupied or maintained by the provider regardless of  
19 the quantity or type of the provider's communications facilities  
20 utilizing the public right-of-way, whether the communications  
21 facilities are leased to another provider or whether the  
22 communications facilities are underground or aboveground.

23 (d) On or before September 1 of each year, a municipality  
24 shall determine its per linear foot fee for the next fiscal year by  
25 updating its calculations by dividing the total forecasted costs of  
26 all communications network providers, by the total amount of linear  
27 feet occupied by all communications network providers.

1       (e) A municipality may only assess a fee under this chapter  
2 if it has one or more public improvement projects budgeted for the  
3 next fiscal year, excluding those related to widening or  
4 straightening of public roadways.

5       Sec. 68.206. PUBLIC RIGHT-OF-WAY COMPENSATION AND  
6 MANAGEMENT. (a) A municipality may elect to adopt an ordinance  
7 under this section.

8       (b) Pursuant to its adoption of an ordinance under this  
9 section, a municipality may set an annual rate not to exceed \$100  
10 for each communications network provider entity possessing,  
11 owning, or controlling communications network facilities located  
12 within the municipality's public right-of-way.

13       (c) Money collected under this section shall compensate  
14 municipalities for their use and management of public right-of-way.

15       Sec. 68.207. REMITTANCE OF FEES. (a) A communications  
16 network provider shall remit quarterly to the municipality the fees  
17 assessed by the municipality under this chapter. The provider  
18 shall remit such fee no later than 45 days after the end of a  
19 quarter.

20       (b) Notwithstanding any other provision of this title, a  
21 communications network provider may recover from the provider's  
22 retail and wholesale customers an assessment imposed on the  
23 provider under this chapter. This may be accomplished by either a  
24 separate or existing line item on a customer bill or through  
25 contract.

26       (c) A provider may apportion the recovery of such costs in a  
27 reasonable manner between business and residential customers, with

1 business customers receiving a higher pro rata apportionment.

2 (d) The sales price of services provided by a communications  
3 network provider shall not include any charge to recover the  
4 assessment to the extent imposed under Subsection (c).

5 Sec. 68.208. PENALTIES. If after notice and hearing the  
6 municipality finds that a person has violated this subchapter, the  
7 municipality may assess the following penalties:

8 (1) for failure to pay an undisputed fee assessed by  
9 the municipality under this title, order the provider to pay a fine  
10 of not more than two times the amount of the fee owed; and

11 (2) for failure to submit information or for material  
12 underreporting of the amount of linear feet to the municipality,  
13 order a fine of not more than two times the amount of the fee that  
14 would have been paid if the information was properly provided.

15 SECTION 4. The Public Utility Commission of Texas shall  
16 conduct a study and shall file a report with the legislature not  
17 later than September 1, 2006, containing the commission's  
18 revenue-neutral, technology-neutral, and competitive-neutral  
19 recommendations concerning compensation flowing to the cities from  
20 voice, video, and cable providers. The report shall identify the  
21 following:

22 (1) all sources of compensation that have been  
23 received by the cities historically from providers of voice, video,  
24 and cable;

25 (2) the providers of voice, video, and cable services  
26 available to consumers within municipalities without regard to the  
27 technology used to deliver such services;



1           (3) alternative funding mechanisms, including an  
2 additional municipal sales tax or any other additional municipally  
3 imposed alternatives, which would be revenue-neutral to the  
4 municipalities, and technology-neutral and competitive-neutral in  
5 application to providers, their services, and their customers; and

6           (4) the payment mechanism of the fees, including all  
7 municipal fees and franchise fees.

8           SECTION 5. Chapter 62, Utilities Code, is repealed.

9           SECTION 6. This Act takes effect September 1, 2005.