

17-1902. Rights, powers and liabilities of telecommunications service providers; occupation of public right-of-way; prohibition of use. (a) (1) "Public right-of-way" means only the area of real property in which the city has a dedicated or acquired right-of-way interest in the real property. It shall include the area on, below or above the present and future streets, alleys, avenues, roads, highways, parkways or boulevards dedicated or acquired as right-of-way. The term does not include the airwaves above a right-of-way with regard to wireless telecommunications or other nonwire telecommunications or broadcast service, easements obtained by utilities or private easements in platted subdivisions or tracts.

(2) "Provider" means a local exchange carrier as defined in subsection (h) of K.S.A. 66-1,187, and amendments thereto, or a telecommunications carrier as defined in subsection (m) of K.S.A. 66-1,187, and amendments thereto, or a video service provider as defined in K.S.A. 2007 Supp. 12-2022, and amendments thereto.

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

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

(b) Any provider shall have the right pursuant to this act to construct, maintain and operate poles, conduit, cable, switches and related appurtenances and facilities along, across, upon and under any public right-of-way in this state. Such appurtenances and facilities shall be so constructed and maintained as not to obstruct or hinder the usual travel or public safety on such public ways or obstruct the legal use by other utilities.

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

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

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

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

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

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

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

(f) A provider's request to use or occupy a specific portion of the public right-of-way shall not be denied without reasonable notice and an opportunity for a public hearing before the city governing body. A city governing body's denial of a provider's request to use or occupy a specific portion of the public right-of-way may be appealed to a district court.

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

(h) A city may not impose the following regulations on providers:

(1) Requirements that particular business offices or other telecommunications facilities be located in the city;

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

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

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

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

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

(k) A city may require a provider to repair all damage to a public right-of-way caused by the activities of that provider, or of any agent affiliate, employee, or subcontractor of that provider, while occupying, installing, repairing or maintaining facilities in a public right-of-way and to return the right-of-way, to its functional equivalence before the damage pursuant to the reasonable requirements and specifications of the city. If the provider fails to make the repairs required by the city, the city may effect those repairs and charge the provider the cost of those repairs. If a city

incurs damages as a result of a violation of this subsection, then the city shall have a cause of action against a provider for violation of this subsection, and may recover its damages, including reasonable attorney fees, if the provider is found liable by a court of competent jurisdiction.

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

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

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

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

(2) an excavation fee for each street or pavement cut to recover the costs associated with construction and repair activity of the provider, their assigns, contractors and/or subcontractors with the exception of construction and repair activity required pursuant to subsection (l) of this act related to construction and maintenance activities directly related to improvements for the health, safety and welfare of the public; provided, however, imposition of such excavation fee must be based upon a regional specific or other appropriate study establishing the basis for such costs which takes into account the life of the city street prior to the construction or repair activity and the remaining life of the city street. Such excavation fee is expressly limited to activity that results in an actual street or pavement cut;

(3) inspection fees to recover all reasonable costs associated with city inspection of the work of the provider in the right-of-way;

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

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

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

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

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

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

(s) Nothing contained in K.S.A. 17-1902, and amendments thereto, is intended to affect the validity of any franchise fees collected pursuant to state law or a city's home rule authority.

(t) Any ordinance enacted prior to the effective date of this act governing the use and occupancy of the public right-of-way by a provider shall not conflict with the provisions of this act.

History: L. 1907, ch. 140, § 3; R.S. 1923, 17-1902; L. 2002, ch. 32, § 3; L. 2006, ch. 93, § 7; July 1.