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The Honorable Kelly Hancock
Members of the Senate Business & Commerce Committee
Texas Senate
P.O. Box 12068
Austin, Texas 78711

Dear Chairman Hancock,

The City of Houston (Houston or City) appreciates the opportunity to testify in opposition to Senate Bill 1152 (SB 1152) relating to the payment of certain fees to municipalities by entities that provide telecommunications and cable and video services. As proposed, the bill presents significant concerns to Houston, both constitutional and fiscal. One of our main concerns is the limitation of the City's ability to collect franchise fees for the use of our right-of-way.

The City holds the right-of-way in trust for its citizens. The right-of-way is used by citizens for transportation purposes — sidewalks, bike lanes and access to the roadways; by the City for its facilities — water and sewer mains, street lights and traffic signals; and by utilities to avoid the additional cost of acquiring separate property for their exclusive use. As steward of this important and coveted asset, the City has a duty to manage the right-of-way for its primary purpose — pedestrian and vehicular traffic. The City also has the duty to ensure the health, safety, and welfare of the public and to preserve the future use and enjoyment of the right of way. Under the State Constitution, the City is allowed to be compensated by those private entities that benefit (and profit) from the use of public property. Houston's comments and concerns, outlined below, are a product of this commitment:

Does Not Appropriately Establish the 'Value' of the Public's Asset

By eliminating an entire set of right-of-way rental fees, the bill ignores long-standing constitutional mandates. Texas Constitution, art. III, § 52 (a) and art. XI, § 3, prohibit the State and other governmental entities (e.g., cities) from making "gifts of public property." A gift includes allowing *the use of public property to any entity for less than market value*. Tex. Atty. Gen. Op. DM-232 (1993).

This constitutional mandate is the rationale behind the right-of-way use compensation methodologies developed for both the telecommunications and cable providers in Texas. Telecommunications providers pay fees based on the number of end users under Chapter 283 of the Local Government Code, which reflects the value they derive from use of the right-of-way. Similarly, pursuant to Chapter 66 of the Utilities Code, cable TV providers pay right-of-way fees based on a percentage of the cable company's revenue earned from the use of the right-of-way – which also reflects the value it derives from use of the right of way.

These legislative grants, and the payments required, were enacted subject to the strictures of the Texas Constitution that require a 'value-based' fee for the use of the public's property. The right-of-way use compensation fee paid is the rental fee for the use of the ROW. While both Chapter 283 and Chapter 66 replaced municipal authority to franchise both telecommunications providers and cable providers with state-level regulations, they both preserved the rights of municipalities to receive franchise fees, in keeping with the Constitutional mandate.

The proposed bill attempts to dictate how much municipalities should be paid for the use of a public asset without any objective measure of the fair market rental value of the property or the analysis of the **private** benefit derived from the use of the public. There is no indication that any analysis has been performed to justify the elimination of this remuneration to the public, nor any evidence presented that cutting the fees will, for example, improve service or increase access to underserved areas of the state. Furthermore, the bill does not state what benefit(s) municipalities will receive in exchange for the corresponding and significant decrease in compensation.

SB 1152 Reduces the Amount of Franchise Fees Collected for the Use of a City (Taxpayer) Asset, while Allowing Providers to Continue to Receive the Same Level of Benefits

SB 1152 reduces the amount of compensation received by the City from companies using the right-of -way by allowing a provider of both cable and video services to pay only one fee for multiple uses of the public asset. This is counter-intuitive with no rational basis or justification. It is analogous to a homeowner asking the legislature to pass a bill allowing him/her to pay only the lesser of a telephone or cable bill to the provider, while still receiving both services.

The Bill does not consider or address the benefits and profits reaped by the providers from using taxpayer property, including but not limited to a waiver of permit fees, or cost avoidance related to the acquisition of their own right-of-way for the same purpose. Additionally, the bill does not address whether any corresponding cost savings to the providers will be shared with their customers – although passing savings on to customers is not sufficient to compensate the taxpayers for the loss of their assets.

The Bill proposed that the amount of franchise fees to be paid by a dual provider would be based on the amounts paid, or amounts that would have been paid, by the provider and any member of the provider's affiliated group during the immediately preceding calendar year. Therefore, the impact to the City annually will vary depending on the provider's determination of what fee will be paid each year. Currently, five companies provide dual cable/video services and telecommunications services in Houston. Under the proposed amendments, the compensation to the City received from companies providing both cable/video services and telecommunications services statewide would drop significantly, by between $17M and $27M annually.

Does Not Allow Municipalities to Responsibly Prepare Budget

The proposed bill acts similarly to an unfunded mandate for municipalities. Municipalities must plan their fiscal year budgets months in advance of the new fiscal year. SB 1152 requires municipalities to predict the decisions of multiple providers based on revenue they generated in the prior calendar year across thousands of cities in Texas. SB 1152 does not specify the reporting, auditing, or communication system that cities would require to accurately track the revenue generated by providers. The complex system needed to implement

SB 1152 would greatly impact a city's ability to create a balanced budget. Currently, cities can accurately forecast based on the certainty provided by State law and Public Utility Commission orders.

Telecommunications and cable/video service providers profit from the use of the public right-of-way. Therefore, value based rental fees allow a municipality, as steward of this asset, to collect the fair value for the use of the taxpayer's property. Any proposed changes must be consistent with this principle and the State Constitutional requirements.

Sylvester Turner, Mayor
City of Houston