
Coates' Canons Blog: New Municipal Broadband Limitations

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One of the more controversial “local government” issues addressed by the North Carolina General Assembly this year is the proper role of municipal governments in providing cable and Internet services. This issue is not new. Several bills relating to municipal broadband service have been introduced in the General Assembly over the past few years. Furthermore, North Carolina is not the only state wrestling with this issue; it currently is being debated in many states across the country. It is not surprising, then, that the municipal broadband bill (**HB 129**) garnered significant national attention this year—even prompting a Harvard Law Professor to pen an **open letter** to Governor Purdue.

Proponents of municipal broadband authority argue, among other things, that there are certain areas, particularly rural areas, which the private sector simply will not serve because it is unprofitable. They contend that the availability of cable and, in particular, broadband Internet services are essential to the economic development of these areas, though. Thus, municipalities should have broad authority to provide these services when the private sector fails to do so. Opponents assert that when municipalities compete with private sector providers the municipalities have an unfair advantage because of their ability to, among other things, obtain tax-free financing, regulate private sector competitors, and take advantage of lower costs due to exemptions from fees and taxes. They further argue that government provision of these services is inefficient and ultimately more costly to consumers.

Presumably attempting to strike a balance between these competing concerns the North Carolina General Assembly enacted **S.L. 2011-84**, which significantly restricts the ability of municipalities to provide cable and Internet services but allows for some exceptions for existing municipal service providers and for services provided to “unserved” areas. (Governor Purdue let the bill become law without her signature on May 21, 2011.) Whether the legislature struck the appropriate balance undoubtedly will be the subject of continued debate. The purpose of this post, however, is simply to describe the provisions in the new Act and discuss their impact on municipal broadband authority in North Carolina.

Authority to Provide Broadband Service

North Carolina municipalities are authorized to provide a number of services as public enterprises—such as water, sewer, solid waste, natural gas, and electric services. (A public enterprise is an activity of a commercial nature that could be provided by the private sector.) Also included among the list of authorized public enterprise services are “cable television systems.” See **G.S. 160A-311**. In *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989), the North Carolina Supreme Court held that a city’s provision of cable services, pursuant to this statutory authority, and its refusal to grant a franchise to private cable providers, did not violate the public purpose, exclusive emoluments, or monopoly clauses of the State Constitution, nor did it violate the State’s antitrust laws. In so holding, the Court determined that there was “a clear legislative intent and expression of the public policy of this state to foster public ownership and operation of both radio and television.”

In light of the *Madison Cablevision* decision, there is no question that municipalities may provide cable television services, but what about Internet services? This question was asked and answered in *BellSouth Telecommunications, Inc. v. City of Laurinburg*, 168 N.C.App. 75, 606 S.E.2d 721 (2005). In that case, the North Carolina Court of Appeals adopted a broad reading of the statutory language in **G.S. 160A-311**, holding that the authority to provide cable television systems included the authority to furnish Internet services over a municipal fiber optic network.

(Note that counties in North Carolina are not authorized under general law to provide or fund cable television or Internet services. Nash County, however, did receive limited authority from the General Assembly this year to provide grants to unaffiliated high-speed Internet providers to expand service in unserved areas for economic development. **S.L. 2011-163**.)

Limitations on Municipal Broadband Authority

To what entities do the new requirements apply?

As stated above, **S.L. 2011-84** imposes some significant limitations on a municipality's authority to provide cable and Internet services. With some exceptions, the limitations apply to a "city-owned communications service provider." A city-owned communications service provider is defined as:

- a city
- that provides cable, video programming, telecommunications, broadband, or high-speed Internet access service (collectively, communication services)
- directly, indirectly, or through interlocal agreement or joint agency
- to the public
- for a fee
- using a wired or wireless network (communications network).

This definition is important because the new limitations only apply to municipalities that meet all of its elements. In particular, the Act's provisions only apply to a municipality that provides the listed services "for a fee." That means that the requirements do not apply to any municipality that provides the above-listed communication services for free to the public. Many local governments provide free Wi-Fi service in their downtown or other central business areas. (In fact, I am taking advantage of Town of Carrboro's free Wi-Fi as I draft this post.) If a municipality uses its unrestricted general fund revenue to finance this service, or any other communications services, it is not subject to the new Act's provisions. (Note that many local governments actually offer this service by taking advantage of excess capacity on their internal broadband networks.)

The definition also requires that communications services be provided "to the public." Thus, the new limitations do not apply to a municipality that provides communications services for its own, internal, inter-governmental purposes. The Act also expressly exempts the "remote reading or polling of data from utility or parking meters, or the provisioning of energy demand reduction or smart grid services for an electric, water, or sewer system" from the new limitations.

What are the new requirements?

The new limitations (and requirements) imposed on city-owned communications services providers (municipal providers) fall into five broad categories.

1. No Special Treatment for Municipal Providers

Many of the new requirements are set forth in **G.S. 160A-340.1** and are aimed at "leveling the playing field" between municipal providers and private communications services providers. The Act requires a municipal provider to comply with all local, State, and federal laws and regulations that are applicable to private providers. A municipal provider is prohibited from directly or indirectly requiring any person to use or subscribe to its communications services. It may not subsidize its communications services with any other revenue source, including revenues generated from other public enterprise activities. And, it may not price any of its communications services below the cost of providing the services. The costs of providing a service must factor in any direct or indirect subsidies received by the municipal provider and the allocation of costs associated with any shared use of municipal buildings, equipment, vehicles, and personnel. In calculating its costs, a municipal provider also must impute the cost of the capital component that is equivalent to the cost of capital available to private communications service providers in the same locality and an amount equal to all taxes, licenses, fees, and other assessments that would apply to a private communications service provider. Moreover, a municipal provider may not air promotions or advertisements for its communication services on a public, educational, or governmental access (PEG) channel if it requires another communications service provider to carry the channel, and a municipality may not use any other municipal resources to promote its communications services that are not allocated for cost accounting purposes to the communications services.

The Act also includes a few different provisions that require municipal providers to make payments in lieu of taxes, to the extent that the municipal provider is otherwise exempt from paying taxes because of its governmental status. This is a further attempt to place a municipal provider on equal footing with a private provider. **G.S. 160A-340.1(a)(9)** requires a municipal provider to remit annually to the municipality's general fund an amount equal "to all taxes or fees [including property taxes] a private communications service provider would be required to pay the city or county in which the city is located . . ." And, **G.S. 160A-340.5** requires that each municipality with an ownership share of a communications network or a joint agency that owns a communications network remit to the county an amount equal to the taxes on the network's real and personal property that it would have paid if not exempt.

That provision also requires a municipal provider to pay to the State an amount equal to any state taxes it would have owed if it were a private provider. And, a municipal provider is not eligible for a sales and use tax refund on the purchase of property and services related to the provision of communications services, except to the extent allowed for private providers.

2. *Equal Access to Infrastructure for Private Service Providers*

A municipality that operates a communications network must allow nondiscriminatory access to private providers, on a first-come, first-served basis, to rights-of-way, poles, or conduits owned, leased, or operated by the municipality unless the facilities have insufficient capacity. **G.S. 160A-340.1(a)(5)**.

3. *Limits on Issuing Debt*

A municipality is prohibited from issuing any type of debt or otherwise entering into contracts to purchase or construct, or finance the purchase or construction of, property for use in a communications network unless it receives explicit voter approval through a referendum process. **G.S. 160A-340.4**. (Voter approval typically is required to issue general obligation bonds (GO) but not to enter into other authorized loan agreements.) The voter approval requirement, except for GO bonds, does not apply to the contracts to finance the repair, rebuilding, replacement, or improvement of an existing communications network, or its equipment.

The Act also imposes additional process and findings requirements for a municipality to receive approval from the Local Government Commission to borrow money to fund the construction, operation, expansion, or repair of a communications system "that is or will be competitive with communications service offered by a private communications service provider." **G.S. 159-175.10**. (These requirements also do not apply to the contracts to finance the repair, rebuilding, replacement, or improvement of an existing communications network, or its equipment.)

4. *Limits on Service Area*

Any new municipal provider (who was not providing communications service before January 1, 2011) must limit its communication service provision to within its corporate limits. **G.S. 160A-340.1(a)(3)**.

5. *Additional Process Requirements*

There are a number of additional procedural requirements imposed on municipal providers by the Act. First, before providing (or undertaking to provide) one or more communications services, a municipality must hold at least two public hearings, not less than 30 days apart, to solicit public input on the proposal. **G.S. 160A-340.3**. Notice of the hearings must be published in a newspaper of general circulation. It also must be provided to the North Carolina Utilities Commission, to be posted on its website, and to all companies that have requested service of the notices from the municipal clerk. A municipality must make any feasibility study, business plan, or public survey that it prepares or conducts available to the public before the public hearings. Private providers must be allowed to participate in the public hearings. (The public hearings requirement does not apply to the repair, rebuilding, replacement, or improvement of an existing communications network or its equipment.)

Second, and more significantly, before undertaking to construct a communications network, a municipality must first solicit proposals from private businesses to partner with the government to provide the communications services (public/private partnership). **G.S. 160A-340.6**.

Finally, generally a municipality must obtain voter approval before selling or discontinuing its public enterprise services (unless the transfer is to another government entity). But **G.S. 160A-340.1(b)** alters this requirement, specifying that voter approval is not required to sell or discontinue a municipal communications network.

Special Exceptions for Certain Municipal Providers and Certain Services

There are a few key exceptions to the application of the new limitations and requirements.

1. Unserved Areas

A municipality is not subject to most of the requirements outlined above if it is providing communications services in an “unserved” area—defined as a census block in which at least 50 percent of the households either have no access to high-speed Internet service or have access to the service only from a satellite provider. **G.S. 160A-340.2**

. A municipality must petition the North Carolina Utilities Commission for a determination that an area is unserved; and private providers are afforded an opportunity to object to the petition. (Note that the public hearings and request for proposals for a public/private partnership requirements still apply to a municipality seeking to provide service in an unserved area.)

2. Grandfathered Providers

A municipality or joint agency that provided communications service as of January 1, 2011, is not subject to any of the Act’s limitations and requirements, as long as it follows certain, specified service area limitations. **G.S. 160A-340.2(c)**.

Links

- www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H129v7.pdf
- www.huffingtonpost.com/lawrence-lessig/an-open-letter-to-north-c_b_864562.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-311.html
- www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H593v4.pdf