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## Coates' Canons Blog: Verifying A Utility Applicant's Identification

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It is common practice for North Carolina local government utilities to require an applicant for utility service to furnish government-issued photo identification. Officials cite the need to protect the integrity of utility operations as justification for the requirement, arguing that it guards against identity theft and protects the utility from (at least some) billing and collections problems.

But is a local government utility legally authorized to require an applicant to provide identification as a condition of receiving utility services? Is it legally compelled to do so? Are there certain forms of identification that a government utility must accept or, on the flip side, may not accept? Who must adopt a policy related to identity verification? This post addresses these frequently asked questions related to verifying the identity of an applicant for utility service and highlights new legal developments in this area.

### **Is a North Carolina local government utility authorized to require an applicant for service to furnish some form of identification as a condition of establishing an account?**

The answer to this question is yes. State law clearly authorizes a local government utility to adopt any "adequate and reasonable rules to protect and regulate a public enterprise belonging to or operated by it." **G.S. 153A-275(b)** (counties); **G.S. 160A-312(b)** (municipalities); *see also* **G.S. 162A-6** (water and sewer authorities); **G.S. 162A-36** (metropolitan water districts); **G.S. 162A-69** (metropolitan sewerage districts); **G.S. 162A-85.5** (metropolitan water and sewerage districts); **G.S. 130A-55** (sanitary districts). Providing utility service is a proprietary function of a local government or public authority (collectively "government utility"), and it often is voluntary. Generally a government utility may set the terms upon which it will contract with an individual or entity to provide service. Such terms may include limitations on who can contract for service (for example, only property owners or only individuals who are deemed credit worthy), and requirements that verify that the person requesting service is who he/she claims to be and/or that the person lawfully resides at the property where service is being requested. As discussed below, however, there are a few important limitations on a government utility's authority to set such conditions for receiving service.

### **Are North Carolina local government utilities required to verify the identity of new utility customers?**

The answer to this question is no. Neither state law, nor federal law, mandates that a local government utility verify the identity of an applicant for service by photo identification or any other means.

There is a federal regulation, referred to as the Red Flags Rule, **16 C.F.R. Part 681 (2012)**, aimed at preventing or mitigating identity theft associated with certain financial transactions, including the opening or maintaining of "customer" accounts that provide for the repayment of loans or the deferred payment for products or services. The Rule appears to apply to many, if not all, government utilities. (Click [here](#) to learn more about the Rule's applicability.)

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The Rule requires a government utility to develop and implement an Identify Theft Prevention (ITP) Program that: (1) identifies red flags for covered accounts and incorporates those red flags into the program; (2) detects red flags that have been incorporated into the program; (3) responds appropriately to any red flags that are detected to prevent and mitigate identity theft; and (4) ensures that the program is periodically updated to reflect changes in risks. A local unit has flexibility to develop a program that is appropriate to the size and complexity of the unit and the nature and scope of its activities. The Rule, itself, does not mandate that a government utility verify the identity of an applicant for service. Doing so, however, is a common way for government utilities to detect and respond to red flags.

### **Considerations in Adopting Identity Verification Policy**

When formulating its own identity verification policy, a government utility should clearly articulate the purpose of the requirement and select form(s) of identification that serve this purpose. It also should carefully consider how identity verification fits within the unit's application process. For example, if a new customer applies for service in person, an identification that includes a photo often is the most effective means of verification. If, however, a unit allows new customers to establish accounts by phone or through the Internet, a photo ID requirement is not particularly helpful, and the unit might consider other non-documentary methods (described below) that would be more effective at accomplishing the utility's goal.

A government utility also should consider the population(s) it is trying to serve. If a unit creates too difficult a barrier to entry to service by restricting the acceptable forms of identification, it may affect the economic viability of the utility.

Finally, the government utility should consider the administrative burden of implementing the policy. A unit must balance its desire to prevent or mitigate identity theft with its desire to process new applications in an efficient and effective manner.

The Red Flags Rule sets out a suggested (but not mandated) protocol for entities to follow in verifying the identity of a utility account applicant. See **16 C.F.R. Part 681, Appendix A** (referencing **31 C.F.R. 103.121**). The protocol encourages a government utility to employ a risk-based process for verifying identity—adopting procedures that enable the utility to form a reasonable belief that it knows the true identity of each applicant. It sets forth two different methods for verifying identity—by documentary means or through non-documentary means.

Examples of documentary means for an individual are unexpired U.S. or foreign government-issued passports, driver's licenses, or military ID cards, deeds, lease agreements, bills from other utility companies, W2s, birth certificates, marriage certificates, green cards, residence permits, proof of checking or saving accounts, immigration papers, or non-driver's government identification (such as SNAP cards). Note that not all documentary means include a photograph. A government utility may require multiple forms of identification, particularly if the utility's employees do not, or cannot, visually compare the individual to a photograph. For a business, documentary means could include certified articles of incorporation or tax identification number. Non-documentary means include information received from an applicant that a utility must verify by comparison to that received by a consumer reporting agency, public database, or other source, or by checking references with other institutions. The protocol also encourages an entity to adopt procedures for taking additional verification measures in certain circumstances, based on the entity's overall risk assessment of an applicant.

### **May a government utility restrict the forms of acceptable identification only to those issued by a state or the federal government and only to those that include photographs?**

The answer to this question is unclear. Such a policy might be lawful if it does not effectively prohibit certain groups of applicants from receiving utility services. The equal protection clauses of the United States and North Carolina Constitutions require a government entity to have a compelling government interest when adopting a policy with suspect classifications, such as those based on race, national origin, religion, and alienage. The policy must be narrowly tailored to achieve that goal, and it must be the least restrictive means for achieving the government's interest. Protecting against potential identity theft may not be a compelling enough reason for a government utility to effectively deny service to a protected class of citizens by mandating that applicants produce U.S. government-issued photo identification, particularly when there are other means to accomplish this goal.

The Town of Dallas, North Carolina, was sued in 2014 by a citizen claiming that the town violated her equal protection rights by requiring her to produce a U.S. government-issued identification as a condition of opening a water account. As a

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noncitizen, she was unable to produce this identification, or provide a Social Security number, and was thereby denied water service. According to media reports, the town settled the case by agreeing amend its policy requiring an applicant for utility service to produce US government-issued identification. See Lauren Baheri, *Dallas negotiating with woman who filed lawsuit after being denied city water*, at [gastongazette.com](http://gastongazette.com) (Sept. 7, 2014). To avoid a similar issue, government utilities should consider accepting a variety of documentary, and possibly non-documentary, forms of identification.

### **Are there forms of identification that a government utility is prohibited from accepting?**

Yes, as of October 1, 2015, a new state law, specifically **Section 11 of S.L. 2015-294**, prohibits a local government or law enforcement agency from accepting the following documents to determine or verify the identify or residency of any person:

1. A Matricular Consular or similar document. A Matricular Consular (also referred to as is a Consular Identification Card or CID) is an identification card issued by the Government of Mexico through its consulate offices to Mexican nationals residing outside of Mexico.
2. Any "identity document" issued or created by a city, county, other local government entity, or any private individual or entity, unless the legislature has expressly authorized the document to be used for this purpose. In recent years, a few nonprofit organizations across the country have adopted programs offering identification cards to immigrants who are working to attain legal status. Some government utilities had accepted these cards as alternatives to government-issued IDs.

Note that the new restrictions do not prohibit a government utility from accepting other identity documents issued by foreign governments, including Mexico. For example, a government utility may accept foreign passports, drivers' licenses, or military ID cards. Also, the new provisions only prohibit the use of an "identity document" that is issued or created by a private entity or local government entity for the purpose of establishing identity. The law does not prohibit a unit from using other documents created by these entities, such as the documents listed in the Red Flags Rule suggested protocol above.

### **May a utility set identification standards so as to effectively deny service to an entity or individual for reasons unrelated to the provision of utility service?**

Assume, for example, that to the dismay of city officials an out-of-state corporation opens an internet sweepstakes café in the city. Could city officials adopt a water utility policy whereby the only acceptable identification from a business entity is proof that it was incorporated in North Carolina, thereby effectively denying service to the internet sweepstakes café? Or what if the county wanted to increase its property tax collection percentage. Could the county sewer department require as proof of identification a receipt from the county tax office showing that the property taxes were paid in full at the residence where service is requested?

Generally the answer to these and related questions is no. In *Dale v. City of Morganton*, 270 N.C. 567, the North Carolina Supreme Court held that at local government's right to refuse a service it renders in its capacity as a utility provider (proprietary capacity) must be determined separately from the functions it performs in its role as a unit of government (governmental capacity). In that case, the city had supplied electricity and water to a certain house in a newly annexed area but later inspected the dwelling and found it unfit for human habitation. It subsequently cut off the electricity supply to the house and refused to reconnect the service. In its review of a challenge to the city's actions, the court held that a city could not deprive an inhabitant, "otherwise entitled thereto, of light, water or other utility service as a means of compelling obedience to its police regulations, however valid and otherwise enforceable those regulations may be." *Id.* at 573.

Case law also suggests that a government utility must have a valid, utility-based rationale for making any distinctions among customers. See, e.g., *Barnhill Sanitation Service v. Gaston County*, 87 N.C.App. 532, 539 (1987) ("The equal protection clauses of the United States and North Carolina Constitutions impose upon law-making bodies the requirements that any legislative classification "be based on differences that are reasonably related to the purposes of the Act in which it is found." " (citations omitted).) Note that in *Dale v. City of Morganton*, the court actually determined that the city's actions to terminate and refuse to reconnect electrical service were lawful because they were based, at least in part, on the fact that the electrical system was unsafe. Thus, according to the court, the city's actions had a valid, utility-based purpose.

If a government utility adopts an identity verification program, it must do so for reasons related to the protection and

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effective operation of the utility. It may not establish (or use) the program to accomplish other government objectives.

### **Who in the government utility may establish an identity verification program?**

The answer to this question, at least for county and municipal utilities, is the governing board. State law requires that the board adopt any rules and regulations to protect and regulate its utility system by ordinance. Such rules and regulations must apply throughout the utility's service area. See **G.S. 153A-275(b)** (counties); **G.S. 160A-312(b)**(municipalities). In other local government utilities, the board may be able to delegate this task to staff members.

## **Links**

- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_153A/GS\\_153A-275.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-275.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_160A/GS\\_160A-312.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-312.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_162A/GS\\_162A-6.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_162A/GS_162A-6.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_162A/GS\\_162A-36.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_162A/GS_162A-36.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_162A/GS\\_162A-69.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_162A/GS_162A-69.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_162A/GS\\_162A-85.5.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_162A/GS_162A-85.5.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_130A/GS\\_130A-55.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_130A/GS_130A-55.html)
- [www.law.cornell.edu/cfr/text/16/681.1](http://www.law.cornell.edu/cfr/text/16/681.1)
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