

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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SENATE BILL 357
Commerce Committee Substitute Adopted 5/7/09

Short Title: Utilities/Regulation of Pole Attachments.

(Public)

Sponsors:

Referred to:

March 3, 2009

A BILL TO BE ENTITLED

AN ACT REQUIRING MUNICIPALITIES AND MEMBERSHIP CORPORATIONS ORGANIZED UNDER CHAPTER 117 OF THE GENERAL STATUTES TO PERMIT COMMUNICATIONS SERVICE PROVIDERS TO USE THEIR POLES, DUCTS, AND CONDUITS FOR ATTACHMENTS AND RELATED USES, AND AUTHORIZING THE NORTH CAROLINA BUSINESS COURT TO CONSIDER AND RESOLVE DISPUTES CONCERNING THE RATES, TERMS, AND CONDITIONS ASSOCIATED WITH THE USE.

The General Assembly of North Carolina enacts:

SECTION 1. Article 3 of Chapter 62 of the General Statutes is amended by adding a new section to read:

"§ 62-55. Regulation of pole attachments.

(a) A municipality, or a membership corporation organized under Chapter 117 of the General Statutes, that owns or controls poles, ducts, or conduits shall allow any communications service provider to utilize their poles, ducts, and conduits at just, reasonable, and nondiscriminatory rates, terms, and conditions adopted pursuant to negotiated or adjudicated agreements. A request to utilize poles, ducts, or conduits under this section may be denied only if there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering principles, and those limitations cannot be remedied by rearranging, expanding, or otherwise reengineering the facilities at the reasonable and actual cost of the municipality or membership corporation, which is to be reimbursed by the communications service provider. In granting a request under this section, a municipality or membership corporation shall require the requesting entity to comply with applicable safety requirements, including the National Electrical Safety Code and the applicable rules and regulations issued by the Occupational Safety and Health Administration.

(b) Following a request from a communications service provider, a municipality or membership corporation shall negotiate concerning the rates, terms, and conditions for the use of or attachment to the poles, ducts, or conduit that it owns or controls. Following a request from a party to an existing agreement made pursuant to the terms of the agreement or made within 120 days prior to or following the end of the term of the agreement, a communications service provider, and the municipality or membership corporation which is a party to that agreement shall negotiate concerning the rates, terms, and conditions for the continued use of or attachment to the poles, ducts, or conduits owned or controlled by one of the parties to the agreement. The negotiations shall include matters customary to such negotiations, including a fair and reasonable rate for use of facilities, indemnification by the attaching entity for losses caused in connection with the attachments, and the removal, replacement, or repair of installed



1 facilities for safety reasons. Upon reasonable request, a party shall state, in writing, its
2 objections to any proposed rate, terms, and conditions of the other party.

3 (c) In the event the parties are unable to reach an agreement within 90 days, or if either
4 party believes in good faith that an impasse has been reached prior to the expiration of the 90-
5 day period, either party may bring an action in Business Court in accordance with the
6 procedures for a mandatory business case set forth in G.S. 7A-45.4, and the Business Court
7 shall have exclusive jurisdiction over such actions. The parties shall identify with specificity in
8 their respective pleadings the issues in dispute, and the Business Court shall (i) establish a
9 procedural schedule which, unless otherwise agreed by the parties, is intended to resolve the
10 action within a time period not to exceed 180 days of the commencement of the action, (ii)
11 resolve any dispute identified in the pleadings consistent with the public interest and necessity
12 so as to derive just and reasonable rates, terms, and conditions, taking into consideration and
13 applying such other factors or evidence that may be presented by a party, including without
14 limitation the rules and regulations applicable to attachments by each type of communications
15 service provider under section 224 of the Communications Act of 1934, as amended, and (iii)
16 apply any new rate adopted as result of the action retroactively to the date immediately
17 following the expiration of the 90-day negotiating period or initiation of the lawsuit, whichever
18 is earlier. Prior to commencing any action under this subsection, a party must pay any
19 undisputed fees related to the use of poles, ducts, or conduits which are due and owing under a
20 preexisting agreement with the municipality or membership corporation, and, in any action
21 brought under this subsection, the court may resolve any existing disputes regarding fees
22 alleged to be owing under a preexisting agreement. The provisions of this section do not apply
23 to an entity whose poles, ducts, and conduits are subject to regulation under section 224 of the
24 Communications Act of 1934, as amended.

25 (d) In the absence of agreement otherwise, in the event that the lines, equipment, or
26 attachments of a communications service provider that are attached to the poles, ducts, or
27 conduits of a municipality or membership corporation do not comply with applicable safety
28 rules and regulations, the municipality or membership corporation may provide written notice
29 of the noncompliant lines, equipment, or attachments, and make demand that the
30 communications service provider bring such lines, equipment, and attachments into compliance
31 with the specified safety rules and regulations within 90 days of the date of the notice and
32 demand. Unless the communications service provider, within those 90 days, demonstrates that
33 its lines, equipment, and attachments are in compliance with all applicable safety rules and
34 regulations, or brings its lines, equipment, and attachments into compliance with the specified
35 applicable safety rules and regulations, the municipality or membership corporation shall be
36 entitled to take such remedial actions as are reasonably necessary to bring the lines, equipment,
37 and attachments of the communications service provider into compliance, including removal of
38 the lines, equipment, or attachments should removal be required to achieve compliance with the
39 applicable safety rules and regulations. A municipality or membership corporation that removes
40 or brings into compliance the noncompliant lines, equipment, or attachments of a
41 communications service provider shall be entitled to recover its reasonable and actual costs for
42 such activities from the communications service provider, and unless otherwise agreed by all of
43 the parties, the communications service provider shall reimburse the municipality or
44 membership corporation within 45 days of being billed for such costs. Nothing herein shall
45 prevent a municipality or membership corporation from taking such action as may be necessary
46 to remedy any exigent issue which is an imminent threat of death or injury to persons or
47 property.

48 (e) For purposes of this section, the term "communications service provider" means a
49 person or entity that provides or intends to provide the following: (i) telephone service as a
50 public utility under Chapter 62 of the General Statutes or as a telephone membership
51 corporation organized under Chapter 117 of the General Statutes; (ii) broadband service, but

1 excluding broadband service over energized electrical conductors owned by a municipality or
2 cooperatively organized entity; or (iii) cable service over a cable system as those terms are
3 defined in Article 42 of Chapter 66 of the General Statutes.

4 (f) The Business Court may adopt such rules as it deems necessary to implement its
5 jurisdiction and authority under this section.

6 (g) Nothing herein shall preclude a party from bringing civil action in the appropriate
7 division of the General Court of Justice seeking enforcement of an agreement concerning the
8 rate, terms, and conditions for the use of or attachment to the poles, ducts, or conduit of a
9 municipality or membership corporation."

10 **SECTION 2.** This act does not constitute certification of State regulation of pole
11 attachments for purposes of section 224 of the Communications Act of 1934, as amended. If a
12 court of competent jurisdiction determines that this act is tantamount to certification, this act
13 shall become null and void.

14 **SECTION 3.** This act is effective when it becomes law.