

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1325 CS

Governmental Authority in Communication Services

SPONSOR(S): Attkisson

TIED BILLS:

IDEN./SIM. BILLS: SB 1714

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Utilities & Telecommunications Committee	12 Y, 1 N	Cater	Holt
2) Finance & Tax Committee	9 Y, 0 N, w/CS	Monroe	Diez-Arguelles
3) Commerce Council			
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

This bill imposes procedural and substantive requirements that must be met by a local government authority in order to provide certain utility services.

This bill will be effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: The bill limits the governmental authority's ability to provide communications services.

B. EFFECT OF PROPOSED CHANGES:

Current Situation

In Florida, counties are established under Section 1 and municipalities are established under Section 2, Article VIII of the Florida Constitution. The Florida Constitution grants local governments broad home rule authority. Specifically, non-charter county governments may exercise those powers of self-government that are provided by general or special law.¹ Those counties operating under a county charter have all powers of self-government not inconsistent with general law, or special law approved by the vote of the electors.² Likewise, municipalities have those governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform its functions and provide services, and exercise any power for municipal purposes except as otherwise provided by law.³ Section 125.01, F.S., enumerates the powers and duties of all county governments, unless preempted on a particular subject by general or special law. Several chapters of the Florida Statutes provide for municipalities and counties to own and operate utilities.⁴

Telecommunications

Entities providing telecommunications services are subject to the authority of the Public Service Commission (PSC or Commission).⁵

The Florida Telecommunications Act of 1995⁶ substantially amended ch. 364, F.S., to open local telecommunications service to competition. At that time, 13 companies were certificated by the Commission. Currently, there are 10 companies certificated as incumbent local exchange telecommunications companies (ILECs) and 424 certificated as competitive local exchange companies (CLECs), 10 of which are municipalities.⁷

On October 1, 1997, Ch. 97-197, L.O.F; creating ss. 125.421 and 166.047, F.S., took effect. The law provides that a telecommunications company which is a municipality, county, or other entity of a local government may hold a certificate required by ch. 364, F.S., and that it serves a public purpose only if the local government accounts separately for revenues, expenses, property, and source of investment dollars associated with providing these services, is subject to all requirements applicable to

¹ Art. VIII, s. 1(f), Fla. Const.

² Art. VIII, s. 1(g), Fla. Const.

³ Art. VIII, s. 2(b), Fla. Const. See Also s. 166.021, F.S.

⁴ See Ch. 125, F.S., County Government; Ch. 153, F.S., Water and Wastewater Systems, Ch. 166, F.S., Municipalities; and Ch. 180, F.S., Municipal Public Works.

⁵ See Ch. 364, F.S.

⁶ Ch. 95-403, L.O.F.

⁷ The municipal CLECs certificated by the PSC include the Cities of Daytona Beach, Gainesville, Lakeland, Ocala, Quincy, Tallahassee, Ft. Pierce Utilities Authority d/b/a/ GigaBand Communications, Kissimmee Utility Authority, Utility Commission of New Smyrna Beach d/b/a Spanks Communications, and Utility Board of the City of Key West d/b/a Key Energy Services.

telecommunications companies and pays ad valorem taxes or equivalent fees on its telecommunications facilities. Local governments providing telecommunications internally or providing internal information to the public for a fee would be exempt from these provisions.

Pending before the Florida Supreme Court is a decision by the First District Court of Appeals affirming the order of the Circuit Court for Leon County granting summary judgment in favor of the City of Gainesville and declaring unconstitutional portions of Ch. 97-197, L.O.F., imposing ad valorem taxes on property owned by a city and used to provide telecommunications services.⁸

Cable

Cable company facilities are broadband facilities capable of providing many advanced services, including voice, data, and video. Cable companies are regulated at the federal level, but states are allowed franchise and taxing authority. Neither state nor federal law prohibits local governments from providing cable services. Federal law does prohibit counties and municipalities from awarding exclusive cable franchises and, if a cable operator provides telecommunications services, that operator cannot be required to obtain a franchise for the provision of telecommunications services.⁹

Advanced Services

Under Chapter 47, United States Code, the Federal Communications Commission (FCC) has jurisdiction over all communications services. According to the FCC, advanced telecommunications capability is the availability of high-speed, switched, broadband telecommunications that enable users to originate and receive high-quality voice, data, graphics, and video using any technology. Advanced services may include digital subscriber line (DSL), cable, optic fiber, wireless, and broadband over power line (BPL) and the necessary switches and software to create the service. The Florida Legislature has specifically exempted from certain regulation by the PSC wireless, broadband, and Voice over Internet Protocol (VoIP) services. Commission jurisdiction remains unaddressed as to certain issues such as interconnection.

Federal Regulations

Section 253 of the Communications Act provides that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”¹⁰ In 1997, Missouri passed a law which prohibited, with limited exceptions, political subdivisions from obtaining a certificate of service authority to provide telecommunications services or facilities. Various Missouri municipal groups and municipal utilities asked the FCC to preempt the Missouri law. The FCC refused to preempt the enactment of the law since it had previously found that political subdivisions of the state are not “entities” under s.253(a) of the Communications Act.¹¹ Following a reversal by the United States Court of Appeals for the Eighth Circuit, the United States Supreme Court agreed with the FCC’s determination that political subdivisions of the state are not “entities” under s. 253(a) of the Communications Act.¹²

Proposed Changes

Section 1.

Title

⁸ 829 So.2d. 595, Department of Revenue v. City of Gainesville

⁹ 47 U.S.C. s. 541

¹⁰ 27 U.S.C. 253(a)

¹¹ 16 F.C.C.R. 1157

¹² 124 S. Ct. 1555

The bill provides that this section may be cited as the "Governmental Authority Provision of Communication Services Act of 2005."

Definitions

The bill contains the following definitions:

Advanced Service -means high speed Internet access service including any service application provided over such access service or any information service as defined in 47 U.S.C. s. 153(20).

Covered Service-includes any advanced service, cable service, or telecommunications service and should be construed in the broadest sense.

Cable Service-has the same meaning as in 47 U.S.C. s. 522(6).

Governmental Authority (GA)-any political subdivision as defined in s. 1.01, F.S., and any utility authority, other authority, board, branch, department, or unit thereof. The term includes any person owned, operated, or controlled by a GA or in which a GA otherwise has an interest, whether direct or indirect.

Omitted Service-a covered service that a GA determines is desired by the authority's residents but is not being provided to the residents by any private provider of covered services.

Person-has the same meaning as defined in s. 1.01, F.S.

Private Provider-a provider of covered services that is not a GA.

Providing, provide, or provision-with respect to a covered service, means offering or supplying a service for a fee or other consideration to a person, including any portion of the public or a GA or private provider. A provider is a person that provides a covered service.

Subscriber-a person who receives a covered service.

Supplying-with respect to a covered service, means actually supplying a service for a fee or other consideration to a person, including any portion of the public or a GA or private provider.

Telecommunications services-the transmission of signs, signals, writing, images, sounds, messages, data, or other information of the users choosing, by wire, radio, light waves, or other electromagnetic means, without change in the form or content of the information as sent and received by the user and regardless of the facilities used, and including fixed and mobile terrestrial wireless technologies or applications.

Prohibition and Exceptions

The bill provides that except as specified, no GA shall provide a covered service or a facility used to provide a covered service. The subsection does not prohibit a GA from supplying a covered service, or a facility used in providing a covered service, for internal operational needs, intergovernmental communications, and public service communications.

The bill provides that if a GA is supplying a covered service on May 1, 2005, it shall be permitted to continue supplying the service, but may not extend or expand its service area for existing or new subscribers, except that a GA which has issued bonds secured by the revenues from a covered service can provide service to residents within the geographic boundaries of the GA.

The bill permits a GA to provide an omitted service only if all the following requirements are completed in the prescribed sequence:

1. The GA must provide written notice to all dealers of communications services registered with the Department or Revenue under Chapter 202, F.S.,¹³ describing the omitted service.
2. After providing written notice, the GA must wait 120 days to determine if a private provider begins to supply the omitted service described in the notice, or a substantially similar service.
3. The GA must retain a feasibility consultant to assess the feasibility of the GA providing the identified service. The feasibility report must include an estimate of the capital investment needed for facilities that will be necessary to provide service, an estimate of the costs of the infrastructure, using full cost accounting, the projected annual operating expenses and revenues, and the GA's proposed method of financing.
4. If determined feasible, the GA must then conduct a public hearing to provide the public an opportunity to consider the contents of the study and to offer comments as to whether the governmental authority should provide the omitted service. The GA shall vote on whether to proceed with its intent to provide service.
5. The GA must then call an election on whether or not the GA may provide the omitted service. The notice of election shall include, with any other information required by law, a summary of the omitted services and a statement that the feasibility study is available for inspection and copying at a designated location. The bill also provides how the ballot language should read.

The ballot proposition may not take effect until it has been submitted to the electors and approved by a majority of those voting. If the ballot question is approved, the GA may thereafter provide the omitted services that were referenced in the ballot question.

In addition, a GA seeking to provide cable services must comply with the federal Cable Communications Policy Act of 1984¹⁴, as well all applicable state and federal rules.

Other provisions include that a GA providing telecommunications services must comply with applicable provisions of ch. 364, F. S., PSC rules, ch. 166, F.S. and all applicable state and federal rules and regulations. In addition, a GA may not exercise its power or authority over zoning or land use issues and may not require any person, including residents of particular developments, to use or subscribe to a covered service provided by the GA.

The GA shall apply its rules, ordinances, and policies and exercise any authority under state or federal laws without discrimination to itself or any private provider of covered services as it relates to any or all of the following:

1. Permitting, access to, and use of public rights-of-way;
2. Permitting, access to, use of, and payment for use of GA owned or controlled poles, conduits, easements, and similar facilities;

In addition, the GA may not pledge any revenues in support of the issuance of any bonds to finance the provision of covered services outside the GA's geographical boundaries. Upon approval by vote of the electors, the GA may issue one or more bonds to finance capital costs for facilities to provide covered services. The election must be conducted as specified in ch. 100, F.S. The GA may not pay any bonds or costs associated with the bonds, secured for this purpose, from general revenues or other enterprises of the GA, or from the proceeds of bonds secured and to be paid by the general taxing powers of the GA. Bonds issued prior to the effective date of the act are not affected by the provisions of the act.

¹³ According to the Department of Revenue there are currently 3,834 registered communications dealers.

¹⁴ 47 U.S.C. ss. 521 et seq.

Water and Wastewater Service

The bill provides that if a GA acquires any tax-paying entity that is providing water or wastewater services, the GA must continue to pay applicable taxes levied upon the entity.

PSC Rulings

The bill requires the PSC to rule in favor of tax-paying entities in all decisions concerning GAs relating to the acquisition of, or contracting with, covered services, water services, or wastewater services if all factors are comparable.

Severability

The provisions of the Act are considered to be severable.

Section 2.

This act shall take effect on becoming law.

C. SECTION DIRECTORY:

Section 1. Provides a short title, provides definitions, provides that except where specified local governments may not provide a covered service, provides exceptions and procedures to provide the service, provides governmental authorities must follow applicable federal and state laws, provides that GA cannot pledge any revenues in support of bond issuance to expand covered services outside of GA's geographical boundaries, provides that GA must continue to pay applicable taxes if it acquires a taxpaying entity providing water or wastewater service, provides that PSC must rule in favor of tax-paying entities in decisions concerning GA relating to certain services, provides a severability clause.

Section 2. This act shall take effect on becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

If a local government eventually provides a covered service, it will receive revenues related to that service.

2. Expenditures:

If a local government decides to provide an omitted service, there will be expenditures associated with providing notice to communications dealers, hiring a consultant for a feasibility study and conducting an election.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

None

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. However, to the extent that this bill would prevent municipalities from raising revenues through providing services, this bill might be found to reduce the authority that municipalities have to raise revenue.

2. Other:

The constitutionality of a municipality being required to pay ad valorem taxes on its property used in providing communications services, raises constitutional concerns since it requires GAs to continue paying applicable taxes if it acquires a tax-paying entity providing water or wastewater service. Article VII, section 3(a) of the Florida Constitution states:

All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation. A municipality, owning property outside the municipality, may be required by general law to make payment to the taxing unit in which the property is located. Such portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law from taxation.

In Department of Revenue v. Gainesville, 859 So.2d 595, the First District Court of Appeal ruled that this imposition of ad valorem tax was unconstitutional. This decision has been appealed and is pending before the Florida Supreme Court.

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

On line 107 the bill states “[t]he ballot at the election shall pose the question. . .”, while line 114 refers to a “ballot proposition” and line 118 refers to a “ballot question”. The bill may need to be amended for consistency.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 29, 2005, the Committee on Finance and Tax adopted four amendments to this bill. The first amendment modified the requirement that the PSC shall rule in favor of governmental authorities in all decisions regarding the acquisition of or contracting for covered services, water services, or wastewater services, to specify that the decision must be in favor of tax-paying entities when “all factors are comparable.” The second amendment modified the definition of “Covered Service” and provides a definition of “Advanced Service.” The third amendment reduced the minimum period after which a governmental authority has provided

written notice of an omitted service before the governmental authority can begin providing that service from 240 to 120 days. Finally, the fourth amendment allows governmental authorities that have issued bonds secured by the revenues from a covered service to continue providing that service to all existing customers and any other residents within the geographic boundaries of the governmental authority.

On April 7, 2005, the Committee on Finance and Tax again considered this bill and passed one additional amendment. The amendment expanded the exception which allows a GA to supply covered services for internal operational needs, to also allow the GA to provide covered services for intergovernmental communications and public service communications