

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

---

Prepared By: Communications and Public Utilities Committee

---

BILL: SB 1714

SPONSOR: Senator Bennett and others

SUBJECT: Communication Services

DATE: April 8, 2005

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wiehle	Caldwell	CU	<b>Pre-meeting</b>
2.	_____	_____	CA	_____
3.	_____	_____	GA	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

---

## I. Summary:

The bill restricts the ability of local governmental entities to provide specified communications services to the public. If a local governmental entity is providing such a service on May 1, 2005, it is permitted to continue, subject to limitations. Additionally, a local governmental entity may begin providing such a service if it complies with requirements set out in the bill, including allowing private providers an opportunity to provide the service and holding a local election to approve the local government providing the service in the absence of a private service. The bill also sets out additional requirements the local government entity must meet in providing the service.

The bill creates an as yet unnumbered section of the Florida Statutes.

## II. Present 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.<sup>1</sup> 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.<sup>2</sup> 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

---

<sup>1</sup> Art. VIII, s. 1(f), Fla. Const.

<sup>2</sup> Art. VIII, s. 1(g), Fla. Const.

municipal purposes except as otherwise provided by law.<sup>3</sup> 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.<sup>4</sup>

### Telecommunications

Entities providing telecommunications services are subject to the authority of the Public Service Commission (PSC or commission).<sup>5</sup>

The Florida Telecommunications Act of 1995<sup>6</sup> 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.<sup>7</sup>

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 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.<sup>8</sup>

### 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

---

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

<sup>4</sup> 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.

<sup>5</sup> See Ch. 364, F.S.

<sup>6</sup> Ch. 95-403, L.O.F.

<sup>7</sup> 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.

<sup>8</sup> 829 So.2d. 595, Department of Revenue v. City of Gainesville

telecommunications services, that operator cannot be required to obtain a franchise for the provision of telecommunications services.<sup>9</sup>

### 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.”<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

## **III. Effect of Proposed Changes:**

The bill restricts the ability of a “governmental authority” to provide a “covered communications service.” It creates the “Governmental Authority Provision of Communication Services Act of 2005” and creates the following definitions for use in the act.

- “Advanced service” means high-speed Internet access service capability in excess of 144 kilobits per second in the upstream or downstream direction, including any service application provided over the high-speed access service or any information service as defined in 47 U.S.C. section 153(20), using any technology or medium.
- “Covered service” means an advanced service, cable service, or telecommunications service and shall be construed broadly to accomplish the stated purposes and objectives of this act.
- “Cable service” has the same meaning as in 47 U.S.C. s. 522(6).

---

<sup>9</sup> 47 U.S.C. s. 541

<sup>10</sup> 27 U.S.C. 253(a)

<sup>11</sup> 16 F.C.C.R. 1157

<sup>12</sup> 124 S. Ct. 1555

- “Governmental authority” (GA) means any political subdivision as defined in s. 1.01, F.S.,<sup>13</sup> and any utility authority, board, branch, department, or unit thereof. The term includes any entity owned, operated, or controlled by a governmental authority or in which a governmental authority otherwise has an interest, whether direct or indirect.
- “Omitted service” means 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.
- “Person” has the same meaning as defined in s. 1.01, F.S.
- “Private Provider” means a provider of covered services that is not a GA.
- “Providing,” “provide,” or “provision” means, with respect to a covered service, 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” means a person who receives a covered service.
- “Supplying” means, with respect to a covered service, 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” means 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.

In general, the bill prohibits a GA from providing a covered service or a facility used to provide a covered service. However, the prohibition does not apply to prohibit a GA from supplying a covered service, or a facility used in providing a covered service, to itself for internal operational needs.

There are two exceptions to this general prohibition. The first is that if a GA is supplying a covered service on May 1, 2005, it is permitted to continue supplying the service, but may not extend or expand its service area, add new subscribers, or increase the covered services offered after that date.

The second exception is that bill permits a GA to provide an omitted service only if all the following requirements are completed in the prescribed sequence.

- The GA must provide written notice to all dealers of communications services registered with the Department of Revenue under Chapter 202, F.S.,<sup>14</sup> of its intent to provide a specific omitted service.
- The GA then must wait 240 days after receipt of the notice to allow a private provider to begin to supply the omitted service described in the notice or a substantially similar service.
- The GA then must retain a feasibility consultant to assess the feasibility of the GA providing the identified omitted service. The consultant must prepare a written feasibility

<sup>13</sup> Section 1.01(8), F.S., defines “political subdivision” to include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state.

<sup>14</sup> According to the Department of Revenue there are currently 3,834 registered communications dealers.

report that must include considerations of the capital investment needed for facilities that will be used to provide the omitted service and, using full-cost accounting, the estimated expenditure of funds for labor, financing, and administering the proposed omitted service, the projected annual operating expenses and revenues, and the governmental authority's proposed method of financing.

- If the feasibility consultant determines that it is feasible for the GA to provide the omitted service, the GA's governing body must schedule a public hearing to consider the contents of the study and give residents an opportunity to offer comments as to whether the governmental authority should provide the omitted service. The GA must then vote on whether to proceed to provide the omitted service.
- If the GA votes to proceed, it must then call an election on whether the GA should provide the omitted service. The notice of election must include, with any other information required by law, a summary of the omitted service and a statement that the feasibility study is available for inspection and copying at a designated location. The bill sets forth sample ballot language which must be substantially followed.

If a majority of the electors approve, the GA may provide the omitted service.

The bill also sets out the following additional requirements. A GA providing cable services must comply with the federal Cable Communications Policy Act of 1984<sup>15</sup> and all applicable state and federal law, including s. 166.046, F.S. (minimum standards for cable television franchises), and chapters 202 (communications service tax), 212 (tax on sales, use, and other transactions), and 337 (contracting, acquisition, disposal, and use of property), F.S., which are applicable to a provider of these services. A GA providing telecommunications services must comply with applicable provisions of Chapter 364, F. S. (PSC regulation of telecommunications companies), PSC rules, Chapter 166, F.S. (the statutes on municipalities), and all applicable state and federal rules and regulations, including s. 166.046, F.S. (minimum standards for cable television franchises), and chapters 202 (communications service tax), 212 (tax on sales, use, and other transactions), and 337 (contracting, acquisition, disposal, and use of property), F.S., which are applicable to a provider of these services.

In addition, a GA may not exercise its power or authority, including zoning or land use powers, to require any person, including residents of particular developments, to use or subscribe to a covered service provided by the GA.

The GA must 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, including laws on permitting, access to, and use of public rights-of-way and 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

---

<sup>15</sup> 47 U.S.C. ss. 521 et seq.

Chapter 100, F.S. Any such bonds must be secured and paid solely from revenue generated by providing the covered service, and no bonds or associated costs may be paid 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. These limitations do not apply to bonds issued prior to the effective date of the act

Finally, a GA that provides a covered service is subject to the provisions in Chapter 542, F.S., on restraint of trade or commerce and monopolies that are applicable to private providers.

Section 2 of the bill provides for severability, providing that if any provision of the act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Section 3 provides that the bill takes effect on becoming law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

Section 18(b) of Article VII of the Florida Constitution provides:

“Except upon approval of each house of the legislature by two-thirds of the membership, the legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would be to reduce the authority that municipalities or counties have to raise revenues in the aggregate, as such authority exists on February 1, 1989.”

To the extent that the bill prevents a governmental authority from raising revenues by providing covered services, this constitutional restriction may apply.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

All dealers of communications services registered with DOR will receive notice when a local government entity seeks specified communications services for its residents, which

may increase the number of private contracts for these services. The bill may not result in the lowest-cost or best-quality service for the residents. If a private provider provides the service, the government is prohibited from providing the service, even if it could do so better and less expensively.

**C. Government Sector Impact:**

A local government entity seeking specified communications services for its residents will incur expenses to provide the notice to dealers of communications services, and if no private company provides the service, expenses of public hearings and an election.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

---

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

---





## **VIII. Summary of Amendments:**

None.

---

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

---