

# 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.)

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Prepared By: General Government Appropriations Committee

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BILL: CS/CS/SBs 2072 & 1714

SPONSOR: General Government Appropriations Committee, Communications & Public Utilities Committee, Senators Constantine, Bennett, and others

SUBJECT: Local Governments

DATE: April 26, 2005

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Caldwell</u>	<u>Caldwell</u>	<u>CU</u>	<u>Fav/CS</u>
2.	<u>Vickers</u>	<u>Yeatman</u>	<u>CA</u>	<u>Fav/3 amendments</u>
3.	<u>Hayes</u>	<u>Hayes</u>	<u>GA</u>	<u>Fav/CS</u>
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

The bill restricts the ability of a local government to provide specified communications services. If a local government is providing a communications service on the effective date of the bill (which takes effect upon becoming a law), it is permitted to continue, subject to limitations. Additionally, a local government 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. 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

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<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

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<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:**

**Section 1** creates a process for a local government to provide communications services. It creates the following definitions for use in applying the restrictions.

- “Advanced service” means high-speed-Internet-access-service capability in excess of 200 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).
- “Cable service” has the same meaning as in 47 U.S.C. s. 522(6).
- “Communications services” includes any “advanced service,” “cable service,” or “telecommunications service” and shall be construed in the broadest sense.
- “Enterprise Fund” means a separate fund to account for the operation of communications services by a local government, established and maintained in accordance with generally

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<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

accepted accounting principles as prescribed by the Governmental Accounting Standards Board.

- “Governmental entity” means any political subdivision as defined in section 1.01, F. S., including any county, municipality, special district, school district, utility authority or other authority or any instrumentality, agency, unity or department thereof. The term does not include airports of governmental entities.
- “Provide,” “providing,” “provision,” or “provisioning” means offering or supplying a communications service for a fee or other consideration to a person, including any portion of the public or private provider, but does not include service by an entity to itself or to any other governmental entity.
- “Subscriber” means a person who receives a communications service.
- “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.

The bill requires a governmental entity that proposes to provide a communications service to hold no less than two public hearings. The hearings cannot be held less than 30 days apart. At least 30 days prior to the first hearing, notice must be given in the predominant newspaper of general circulation in the area considered for service. At least 40 days prior to the first hearing, the governmental entity must electronically provide notice to the Department of Revenue and the Public Service Commission, which shall post the notice on their web sites. The Department of Revenue shall also send the notice by U.S. Postal Service to the known addresses for all dealers of communications service registered with the department under chapter 202, F.S., or provide an electronic notification within ten days after receiving the notice. The notice must include the time and place of the hearings, state that the purpose of the meeting is to consider whether the governmental entity will provide communications services, and at minimum state the geographic areas proposed to be served by the governmental entity, the services believed not to be currently provided, and that the dealer may appear and be heard.

At least one of the public hearings required, the governmental entity must consider:

- Whether the proposed service is currently being offered and if it is generally available throughout the community;
- Whether a similar service is currently being offered and if it is generally available throughout the community;
- If the proposed or similar service is not currently offered, whether any other service provider proposed to offer such service and what assurances the provide will or can offer in providing such services;
- What capital investment, the estimated cost of operation and maintenance, estimated revenues and expenses, and method of financing is required by the governmental entity to provide the proposed service;
- The private and public costs and benefits of providing the service by a private or governmental entity, including the affect on existing and future jobs, actual economic development prospects, tax-base growth, education and public health.

The governmental entity must also make available at least one of the public hearings a written business plan for the proposed communications service venture that contains, at minimum:

- The projected number of customers and the geographic area to be served;
- The types of communications services to be provided;
- A plan to ensure that revenues exceed operating expenses and payment of principal and interest on debt within 4 years;
- Estimated capital and operational costs and revenue for the first 4 years;
- Projected network modernization and technological upgrade plans, including estimated costs.

The governmental entity may authorize providing a communications service by a majority recorded vote and by resolution, ordinance or other formal means of adoption after making specific findings on the considerations heard at the hearings.

Bonds may be issued to finance the capital costs for facilities to provide a communications service. However:

- Only revenues within the county in which the entity is located or within an area in which it provides electric service outside the county under certain electric service territorial agreements may be pledged in support of the issuance. A municipality or special district must obtain consent of the local governmental entity within the boundaries of which it proposes to provide communications services under certain conditions;
- Revenue bonds issued in order to finance providing a communications service are not subject to approval of the electors if they mature within 15 years. Bonds with a maturity of greater than 15 years must be approved by the electors and conducted as specified by law.

In addition, the governmental entity must not price any communications service below the cost of providing such service by subsidizing with moneys from rates paid by customers of a noncommunications service utility or from any other revenues. A cost standard is provided in the bill. The governmental entity must comply with certain record keeping requirements and keep separate and accurate books and records maintained in accordance with generally accepted accounting principles and make such books and records available for audit. Additional accounting standards are required to facility equitable distribution of indirect costs.

The governmental entity is required to establish an enterprise fund. It is also required to adopt separate operating and capital budgets and may not use its powers of eminent domain solely for the purpose of providing a communications service.

The governmental entity is to annually review at a public meeting the progress made toward reaching the business plan goals and objectives. At the meeting, the governmental entity shall review the related revenues, operating expenses, and payment of interest on debt. If, after four years of operation, revenues do not exceed operating expenses and payment of principal and interest and debt, the governmental entity shall hold a public hearing to consider the disposition of the system. Such disposition may include selling off, partnering with a private provider, or cutting costs and expenses.

Any local government providing cable services must comply with the federal Cable Communications Policy Act of 1984<sup>13</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 local government providing a telecommunications service or advanced service must comply with applicable provisions of Chapter 364, F. S. (Public Service Commission 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 governmental entity may not exercise its power or authority, including zoning or land use regulation, to require any person, including residents of particular developments, to use or subscribe to a communications service provided by the local government.

The governmental entity 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 communications 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 local government owned or controlled poles. The local government is subject to the same terms, conditions, and fees, if any, for access to government-owned poles which it charges to a private provider for such access.

The bill provides a grandfather clause for a governmental entity that is providing advanced service, cable service, or telecommunications service before April 1, 2005, or that has issued debt pledging revenues from those services before April 1, 2005, or where the governing body has authorized the providing of those services and purchased equipment is not required to comply with paragraphs (2)(a) through (f), (k), and (l) (relating to the notice, hearings, public meetings, accounting, and books and records) in order to continue to provide such services. Governmental entities must still comply with the restraint of trade or commerce and monopolies provisions in Chapter 542, F.S.

The committee substitute recognizes the need to ensure the safe and secure transportation of passengers and freight through an airport facility and, therefore, provides an exemption for airport authorities or governmental entities with airports under certain conditions. Airports may provide communications services to subscribers that are airlines and emergency service entities that are within its airport layout plan and may provide shared tenant services, but not dial tone enabling subscribers to complete calls outside the airport layout plan, to subscribers within the airport layout plan which are not integral and essential to the safe and secure transportation of passengers and freight. Airports are not exempt from the provisions of the bill if the provide communications services to subscribers within the airport layout plan that are not integral and

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<sup>13</sup> 47 U.S.C. ss. 521 et seq.

essential to the safe and secure transportation of passengers and freight through the airport facility or to subscribers outside the airport layout plan.

Finally, a governmental entity that provides a communications 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:

None.

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:

Indeterminate.

C. Government Sector Impact:

A government entity seeking specified communications services will incur expenses to provide the notice to dealers of communications services. The Department of Revenue may incur additional expenses for its role in the notification process.

#### **VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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

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

None.

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