

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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SENATE BILL 357
Commerce Committee Substitute Adopted 5/7/09
PROPOSED HOUSE COMMITTEE SUBSTITUTE S357-PCS75274-RV-50

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 its 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 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 receipt of 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 conduits 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, the 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



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1 the parties to the agreement. The negotiations shall include matters customary to such
2 negotiations, including a fair and reasonable rate for use of facilities, indemnification by the
3 attaching entity for losses caused in connection with the attachments, and the removal,
4 replacement, or repair of installed facilities for safety reasons. Upon request, a party shall state
5 in writing its objections to any proposed rate, terms, and conditions of the other party.

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

30 (d) In the absence of an agreement between an attaching party and the involved
31 municipality or membership corporation that provides otherwise, the following shall apply:

- 32 (1) When the lines, equipment, or attachments of a communications service
33 provider that are attached to the poles, ducts, or conduits of a municipality or
34 membership corporation do not comply with applicable safety rules and
35 regulations set forth in subsection (a) of this section, the municipality or
36 membership corporation may provide written notice of the noncompliant
37 lines, equipment, or attachments, and make demand that the communications
38 service provider bring such lines, equipment, and attachments into
39 compliance with the specified safety rules and regulations. Within the
40 60-day period following the date of the notice and demand, the
41 communications service provider shall either contest the notice of
42 noncompliance in writing or bring its lines, equipment, and attachments into
43 compliance with the specified applicable safety rules and regulations. If the
44 work required to bring the facilities into compliance is not reasonably
45 capable of being completed within the 60-day period, the period for
46 compliance shall be extended as may be deemed reasonable under the
47 circumstances so long as the communications service provider promptly
48 commences and diligently pursues within the 60-day period such actions as
49 are reasonably necessary to cause the facilities to be brought into
50 compliance.

1 (2) When the communications service provider, or if applicable another
2 responsible attaching party, fails to bring any noncompliant lines,
3 equipment, or attachments into compliance (i) within the 60-day period
4 following the date of notice and demand pursuant to subdivision (1) of this
5 subsection, or (ii) within 120 days following the date of notice and demand
6 when the period is extended pursuant to subdivision (1) of this subsection,
7 the municipality or membership corporation shall be entitled to take such
8 remedial actions as are reasonably necessary to bring the lines, equipment,
9 and attachments of the communications service provider into compliance,
10 including removal of the lines, equipment, or attachments should removal be
11 required to achieve compliance with the applicable safety rules and
12 regulations.

13 (3) A municipality or membership corporation that removes or brings into
14 compliance the noncompliant lines, equipment, or attachments of a
15 communications service provider pursuant to subdivision (2) of this
16 subsection shall be entitled to recover its reasonable and actual costs for such
17 activities from the communications service provider or other attaching party
18 whose action or inaction caused the noncompliance, and the responsible
19 attaching party shall reimburse the municipality or membership corporation
20 within 45 days of being billed for such costs.

21 (4) All attaching parties shall work cooperatively to determine the causation of,
22 and to effectuate any remedy for, non-compliant lines, equipment, and
23 attachments. In the event of disputes under this subsection, the involved
24 municipality or membership corporation or any attaching party may bring an
25 action in the Business Court in accordance with the procedures for a
26 mandatory business case set forth in G.S. 7A-45.4, and the Business Court
27 shall have exclusive jurisdiction over such actions. The Business Court shall
28 resolve such disputes consistent with the public interest and necessity.
29 Nothing herein shall prevent a municipality or membership corporation from
30 taking such action as may be necessary to remedy any exigent issue which is
31 an imminent threat of death or injury to persons or damage to property.

32 (e) For purposes of this section, the term "communications service provider" means a
33 person or entity that provides or intends to provide: (i) telephone service as a public utility
34 under Chapter 62 of the General Statutes or as a telephone membership corporation organized
35 under Chapter 117 of the General Statutes; (ii) broadband service, but excluding broadband
36 service over energized electrical conductors owned by a municipality or membership
37 corporation; or (iii) cable service over a cable system as those terms are defined in Article 42 of
38 Chapter 66 of the General Statutes.

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

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

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

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