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Municipal Telecommunications Private Industry Safeguards Act

Summary

The Legislature recognizes the importance of the widespread provision of telecommunications and advanced services and cable television services. For the vast majority of citizens these services are provided by private entities. In certain instances municipalities or their agents have sought to provide such services in competition with private providers. This act limits the authority of municipalities to own and operate telecommunications and advanced service and cable television facilities and to provide public and advanced telecommunication and cable television services to a municipality's inhabitants. When municipalities do provide such services this act provides safeguards to ensure that private providers with whom the municipality competes are not disadvantaged by the municipality in the exercise of its bonding and taxing authority, management of rights of way, assessment of fees or taxes, or in any other way.

Model Legislation

The people of the State of _____ do enact as follows:

Section 1. {Short Title} This Act shall be known as the "Municipal Telecommunications Private Industry Safeguards Act."

Part 1. General Provisions

Section 2. {Legislative Findings and Declarations}

(1) The Legislature finds that it is the policy of this state to:

- (a) ensure that cable television services and telecommunications and advanced services are provided through fair competition consistent with the federal Telecommunications Act of 1996, Pub. L. 104-104, in order to provide the widest possible diversity of information and news sources to the general public;
- (b) advance the exercise of rights under the First Amendment of the Constitution of the United States;
- (c) enhance the development and widespread use of technological advances in providing cable television services and telecommunications and advanced services;
- (d) encourage improved customer service of cable television services and telecommunications and advanced services at competitive rates;

Did you know that global telecommunications company AT&T was the corporate co-chair in 2011?

(e) ensure that cable television services and telecommunications and advanced services are each provided within a consistent, comprehensive, and nondiscriminatory federal, state, and local government framework; and

(f) ensure that when a municipality provides to its inhabitants cable television services, telecommunications or advanced services, or any combination thereof, and competes with private providers whose activities are regulated by the municipality, the municipality does not discriminate against the competing providers of the same services.

Section 3. {Definitions} As used in this chapter:

(1) "Advanced service" means: high-speed Internet access capability in excess of 144 kilobits per second both upstream and downstream.

(2) "Cable television service" means:

(a) the one-way transmission to subscribers of:

(i) video programming; or

(ii) other programming service; and

(b) subscriber interaction, if any, that is required for the selection or use of:

(i) the video programming; or

(ii) other programming service.

(3) "Capital costs" means all costs of providing a service that are capitalized in accordance with generally accepted accounting principles.

(4) "Cross subsidize" means to pay a cost included in the direct costs or indirect costs of providing a service that is not accounted for in the full cost of accounting of providing the service.

(5) "Direct costs" means those expenses of a municipality that:

(a) are directly attributable to providing:

(i) a cable television service; or

(ii) a telecommunications or advanced service; and

(b) would be eliminated if the service described in Subsection (4)(a) were not provided by the municipality.

(6) "Feasibility consultant" means an individual or entity with expertise in the processes and economics of providing:

(a) cable television service; and

(b) telecommunications or advanced service.

(7) (a) "Full-cost accounting" means the accounting of all costs incurred by a municipality in providing:

- (i) a cable television service; or
- (ii) a telecommunications or advanced service.

(b) The costs included in a full-cost accounting include all:

- (i) capital costs;
- (ii) direct costs; and
- (iii) indirect costs.

(8) (a) "Indirect costs" means any costs:

- (i) identified with two or more services or other functions; and
- (ii) that are not directly identified with a single service or function.

(b) "Indirect costs" may include cost factors for:

- (i) administration;
- (ii) accounting;
- (iii) personnel;
- (iv) purchasing;
- (v) legal support; and
- (vi) other staff or departmental support.

(9) "Private provider" means a person that:

- (a) provides:
 - (i) cable television services; or
 - (ii) telecommunications or advanced services; and
- (b) is a private entity.

(10) "Telecommunications service" means the two-way transmission of signs, signals, writing, images, sounds, messages, data, or other information of any nature by wire, radio, lightwaves, or other electromagnetic means offered to the public generally.

(11) "Subscribers" means a person that lawfully receives:

- (a) cable television services; or
- (b) telecommunications or advanced services.

Section 4. {Antitrust immunity}

(1) When a municipality is offering or providing a cable television service or telecommunications or advanced service, the immunity from antitrust liability afforded to political subdivisions of the state under [Section of state statutes providing antitrust immunity] does not apply to the municipality providing those services.

(2) A municipality that provides a cable television service or a telecommunications or advanced service is subject to applicable antitrust liabilities under the federal Local Government Antitrust Act of 1984, 15 U.S.C. Secs. 34 to 36.

Section 5. {Scope of chapter}

(1) Nothing in this chapter authorizes any county or other political subdivision of this state to:

(a) provide:

- (i) a cable television service; or
- (ii) a telecommunications or advanced service; or

(b) purchase, lease, construct, maintain, or operate a facility for the purpose of providing:

- (i) a cable television service; or
- (ii) a telecommunications or advanced service.

(2) Nothing in this chapter applies to a municipality purchasing, leasing, constructing, or equipping facilities:

(a) that are designed to provide services within the municipality; and

(b) that the municipality:

- (i) uses for internal municipal government purposes; or
- (ii) by written contract, leases, sells capacity in, or grants other similar rights to a private provider to use the facilities in connection with a private provider offering:

(A) cable television services; or

(B) telecommunications or advanced services.

Section 6. {Severability} If any provision of this chapter or the application of any provision of this chapter is found invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

Part 2. Conditions for Providing Services

Section 7. {Limitations on providing a cable television and telecommunications and advanced services}

(1) Except as provided in this chapter, a municipality may not:

(a) provide to one or more subscribers:

(i) a cable television service; or

(ii) a telecommunications or advanced service; or

(b) for the purpose of providing a cable television service or a telecommunications or advanced service to one or more subscribers, purchase, lease, construct, maintain, or operate any facility.

(2) For purposes of this chapter, a municipality provides a cable television service or telecommunications or advanced service if the municipality provides the service:

(a) directly or indirectly, including through an authority or instrumentality:

(i) acting on behalf of the municipality; or

(ii) for the benefit of the municipality;

(b) by itself;

(c) through:

(i) a partnership; or

(ii) joint venture; or

(d) by contract, resale, or otherwise.

Section 8. {Required steps before a municipality may provide cable television or telecommunications or advanced services}

Before a municipality may engage or offer to engage in an activity described in Subsection 7(1), the legislative body of the municipality shall:

(1) hold a preliminary public hearing;

(2) if the legislative body elects to proceed after holding the preliminary public hearing required by Subsection (1), approve the hiring of a feasibility consultant to conduct a feasibility study in accordance with Section 9;

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(3) determine whether under the feasibility study conducted under Section 9, the average annual revenues under Subsection 9 (2)(f) exceed the average annual costs under Subsection 9 (2)(e) by at least the amount necessary to meet the bond obligations of any bonds issued to fund the proposed cable television services or telecommunications or advanced services:

(a) based on the feasibility study's analysis:

(i) for the first year of the study; and

(ii) the five-year projection; and

(b) separately stated with respect to:

(i) the proposed cable television services; or

(ii) the proposed telecommunications or advanced services;

(4) if the conditions of Subsection (3) are met, hold the public hearings required by Section 9; and

(5) after holding the public hearings required by Section 9, if the legislative body of the municipality elects to proceed, adopt by resolution the feasibility study.

Section 9. {Feasibility study on providing cable television or public or advanced telecommunications services -- Public hearings}

(1) If a feasibility consultant is hired under Section 9, the legislative body of the municipality shall require the feasibility consultant to:

(a) complete the feasibility study in accordance with this section;

(b) submit to the legislative body by no later than 180 days from the date the feasibility consultant is hired to conduct the feasibility study:

(i) the full written results of the feasibility study; and

(ii) a summary of the results that is no longer than one page in length; and

(c) attend the public hearings described in Subsection (4) to:

(i) present the feasibility study results; and

(ii) respond to questions from the public.

(2) The feasibility study described in Subsection (1) shall at a minimum consider:

(a) (i) if the municipality is proposing to provide cable television services to subscribers, whether the municipality providing cable television services in the manner proposed by the municipality will hinder or advance competition for cable television services in the municipality;

(ii) if the municipality is proposing to provide telecommunications or advanced services to subscribers, whether the municipality providing telecommunications or advanced

services in the manner proposed by the municipality will hinder or advance competition for telecommunications or advanced services in the municipality;

(b) whether but for the municipality any person would provide the proposed:

(i) cable television services; or

(ii) telecommunications or advanced services;

(c) the fiscal impact on the municipality of:

(i) the capital investment in facilities that will be used to provide the proposed:

(A) cable television services; or

(B) telecommunications or advanced services; and

(ii) the expenditure of funds for labor, financing, and administering the proposed:

(A) cable television services; or

(B) telecommunications or advanced services;

(d) the projected growth in demand in the municipality for the proposed:

(i) cable television services; or

(ii) telecommunications or advanced services;

(e) the projections at the time of the feasibility study and for the next five years, of a full-cost accounting for a municipality to purchase, lease, construct, maintain, or operate the facilities necessary to provide the proposed:

(i) cable television services; or

(ii) telecommunications or advanced services; and

(f) the projections at the time of the feasibility study and for the next five years of the revenues to be generated from the proposed:

(i) cable television services; or

(ii) telecommunications or advanced services.

(3) For purposes of the financial projections required under Subsections (2)(e) and (f), the feasibility consultant shall assume that the municipality will price the proposed cable television services or telecommunications or advanced services consistent with Subsection 13(5).

(4) If the results of the feasibility study satisfy the revenue requirement of Subsection 9(3), the legislative body, at the next regular meeting after the legislative body receives the results of the feasibility study, shall schedule at least two public hearings to be held:

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- (a) within 60 days of the meeting at which the public hearings are scheduled;
- (b) at least seven days apart; and
- (c) for the purpose of allowing:
 - (i) the feasibility consultant to present the results of the feasibility study; and
 - (ii) the public to:
 - (A) become informed about the feasibility study results; and
 - (B) ask questions of the feasibility consultant about the results of the feasibility study.

(5) (a) Except as provided in Subsection (5)(c), the municipality shall publish notice of the public hearings required under Subsection (4) at least once a week for three consecutive weeks in a newspaper of general circulation in the municipality.

(b) The last publication of notice required under Subsection (5)(a) shall be at least three days before the first public hearing required under Subsection (4).

(c) (i) If there is no newspaper of general circulation in the municipality, for each 1,000 residents, the municipality shall post at least one notice of the hearings in a conspicuous place within the municipality that is likely to give notice of the hearings to the greatest number of residents of the municipality.

(ii) The municipality shall post the notices at least seven days before the first public hearing required under Subsection (4) is held.

Section 10. {Vote permissible - Referendum }

(1) (a) A legislative body by a majority vote may call an election on whether or not the municipality shall provide the proposed:

(i) cable television services; or

(ii) telecommunications or advanced services.

(b) If under Subsection (1)(a) the legislative body calls an election, the election shall be held:

(i) (A) at the next municipal general election; or

(B) as provided in [State statutes regarding special elections] at a local special election the purpose of which is authorized by this section; and

(ii) in accordance with [State statutes regarding elections], except as provided in this section.

(c) The notice of the election shall include with any other information required by law:

(i) a summary of the cable television services or telecommunications or advanced services

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that the legislative body of the municipality proposes to provide to subscribers residing within the boundaries of the municipality;

(ii) the feasibility study summary under Section 9;

(iii) a statement that a full copy of the feasibility study is available for inspection and copying; and

(iv) the location in the municipality where the feasibility study may be inspected or copied.

(d) The ballot at the election shall pose the question substantially as follows: Shall the [name of the municipality] provide [cable television service or telecommunications or advanced service] to the inhabitants of the [municipality].

(e) The ballot proposition may not take effect until submitted to the electors and approved by the majority of those voting on the ballot.

(2) In accordance with [State statutes regarding referenda or local option], Issues Submitted to the Voters, a municipality legislative body's action to have the municipality provide cable television services or telecommunications or advanced services is subject to local referenda.

Part 3. Operational Requirements and Limitations

Section 11. {Enterprise funds for cable television or telecommunications or advanced services}

(1) A municipality that provides a cable television service or a telecommunications or advanced service under this chapter:

(a) shall establish an enterprise fund to account for the municipality's operations of a cable television service or telecommunications or advanced service;

(b) shall adopt separate operating and capital budgets for the municipality's:

(i) cable television services; and

(ii) telecommunications or advanced services;

(c) may not transfer any appropriation or other balance in any enterprise fund established by the municipality under this section to another enterprise fund; and

(d) may not transfer any appropriation or other balance in any other enterprise fund established by the municipality to any enterprise fund established by the municipality under this section.

(2) The restrictions on transfers described in Subsections (1)(d) and (e) do not apply to transfers made by a municipality between other enterprise funds established by the municipality.

Section 12. {Bonding authority}

(1) The legislative body of a municipality may by resolution determine to issue one or more bonds to finance the capital costs for facilities necessary to provide to subscribers:

(a) a cable television service; or

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(b) a telecommunications or advanced service.

(2) The resolution described in Subsection (1) shall:

(a) describe the purpose for which the indebtedness is to be created; and

(b) specify the dollar amount of the one or more bonds proposed to be issued.

(3) (a) A bond issued under this section shall be secured and paid for solely from the revenues generated by the municipality from providing:

(i) cable television services with respect to bonds issued to finance facilities for the municipality's cable television services; and

(ii) telecommunications or advanced services with respect to bonds issued to finance facilities for the municipality's telecommunications or advanced services.

(b) A municipality may not pay the origination, financing, or other carrying costs associated with the one or more bonds issued under this section from the general funds or other enterprise funds of the municipality.

Section 13. {General operating limitations} A municipality that provides a cable television service or a telecommunications or advanced service under this chapter is subject to the operating limitations of this section.

(1) A municipality that provides a cable television service shall comply with:

(a) the Cable Communications Policy Act of 1984, 47 U.S.C. 521, et seq.; and

(b) the regulations issued by the Federal Communications Commission under the Cable Communications Policy Act of 1984, 47 U.S.C. 521, et seq.

(2) A municipality that provides a telecommunications or advanced service shall comply with:

(a) the Telecommunications Act of 1996, Pub. L. 104-104;

(b) the regulations issued by the Federal Communications Commission under the Telecommunications Act of 1996, Pub. L. 104-104;

(c) applicable state statutes relating to:

(i) the interconnection of essential facilities; and

(ii) the purchase and sale of essential services; and

(d) applicable rules of the state Public Service Commission.

(3) A municipality may not cross subsidize its cable television services or its public or advanced telecommunications services with:

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(a) tax dollars;

(b) income from other municipal or utility services;

(c) below-market rate loans from the municipality; or

(d) any other means.

(4) (a) A municipality may not make or grant any undue or unreasonable preference or advantage to itself or to any private provider of:

(i) cable television services; or

(ii) telecommunications or advanced services.

(b) A municipality shall apply without discrimination as to itself and to any private provider the municipality's ordinances, rules, and policies, including those relating to:

(i) obligation to serve;

(ii) access to public rights of way;

(iii) permitting;

(iv) performance bonding;

(v) reporting; and

(vi) quality of service.

(5) In calculating the rates charged by a municipality for a cable television service or a telecommunications or advanced service, the municipality:

(a) shall include within its rates an amount equal to all taxes, fees, and other assessments that would be applicable to a similarly situated private provider of the same services, including:

(i) federal, state, and local taxes;

(ii) franchise fees;

(iii) permit fees;

(iv) pole attachment fees; and

(v) fees similar to those described in Subsections (5)(a)(i) through (iv); and

(b) may not price any cable television service or telecommunications or advanced service at a level that is less than the sum of:

(i) the actual direct costs of providing the service;

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(ii) the actual indirect costs of providing the service; and

(iii) the amount determined under Subsection (5)(a).

(6) (a) A municipality that provides cable television services or public or advanced telecommunications services shall establish and maintain a comprehensive price list of all cable television services or telecommunications or advanced services offered by the municipality.

(b) The price list required by Subsection (6)(a) shall:

(i) include all terms and conditions relating to the municipality providing each cable television service or telecommunications or advanced service offered by the municipality;

(ii) be published in a newspaper having general circulation in the municipality; and

(iii) be available for inspection:

(A) at a designated office of the municipality; and

(B) during normal business hours.

(c) At least five days before the date a change to a municipality's price list becomes effective, the municipality shall:

(i) notify the following of the change:

(A) all subscribers to the services for which the price list is being changed; and

(B) any other persons requesting notification of any changes to the municipality's price list; and

(ii) publish notice in a newspaper of general circulation in the municipality.

(d) If there is no newspaper of general circulation in the municipality, the municipality shall publish the notice required by this Subsection (6) in a newspaper of general circulation that is nearest the municipality.

(e) A municipality may not offer a cable television service or a telecommunications or advanced service except in accordance with the prices, terms, and conditions set forth in the municipality's price list.

(7) A municipality may not offer to provide or provide cable television services or public or advanced telecommunications services to a subscriber that does not reside within the geographic boundaries of the municipality.

(8) (a) A municipality shall keep accurate books and records of the municipality's:

(i) cable television services; and

(ii) telecommunications or advanced services.

(b) The books and records required to be kept under Subsection (8)(a) are subject to audit [by the appropriate unit of state government] to verify the municipality's compliance with the requirements of this chapter including:

- (i) pricing;
- (ii) record keeping; and
- (iii) antidiscrimination.

(9) A municipality may not receive distributions from the state's universal service fund established in [applicable section of State statutes] .

Section 14. {Eminent domain}

(1) A municipality may not exercise its power of eminent domain to condemn plant and equipment of a private provider for the purpose of providing to a subscriber:

- (a) a cable television service; or
- (b) a telecommunications or advanced service.

(2) A municipality may not exercise its power of eminent domain to condemn the real property, whether in whole or to obtain an easement for the purpose of providing to a subscriber:

- (a) a cable television service; or
- (b) a telecommunications or advanced service.

Section 15. {Quality of service standards}

(1) A municipality that provides a cable television service or a telecommunications or advanced service shall adopt an ordinance governing the quality of service the municipality shall provide to its subscribers.

(2) The ordinance required by Subsection (1) shall:

- (a) be competitively neutral; and
- (b) contain standards that are substantially similar to the standards imposed on private providers operating within the geographic boundaries of the municipality under:
 - (i) the Cable Communications Policy Act of 1984, 47 U.S.C. 521, et seq.;
 - (ii) the Telecommunications Act of 1996, Pub. L. 104-104;
 - (iii) [State statutes governing public utilities];
 - (iv) regulations issued by the Federal Communications Commission under the statutes listed in Subsections (2)(b)(i) and (ii); and

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(v) rules made by the [State Public Service Commission]

Section 16. {Enforcement and appeal}

(1) Before a person that is or is likely to have a substantial interest affected by a municipality's violation of this chapter may file an action in district court for violation of this chapter, that person shall file a written complaint with the municipality in accordance with this section.

(2) (a) A municipality that provides a cable television service or a public or advanced telecommunications service shall enact an ordinance establishing a procedure for the filing and resolution of complaints relating to the municipality providing:

(i) a cable television service; or

(ii) a telecommunications or advanced service.

(b) The procedure required by Subsection (2)(a) shall:

(i) permit any person described in Subsection (1) to file a complaint including:

(A) an individual subscriber; or

(B) a private provider that competes with the municipality in the geographic boundaries of the municipality;

(ii) establish an expedited process that requires within 45 days after the date the complaint is filed:

(A) that a hearing be held, unless the parties to the proceeding waive the requirement of a hearing; and

(B) the issuance of a final decision; and

(iii) provide that failure to render a decision within the time allotted shall be treated as an adverse decision for purposes of appeal.

(3) Appeal of an adverse decision from the municipality may be taken to the district court for a de novo proceeding.

Section 19. {Effective date} This bill will become effective upon enactment.

Adopted by the Telecommunications & Information Technology Task Force at the Annual Meeting, August 9, 2002. Approved by the full ALEC Board of Directors September, 2002.

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