

VIRGINIA ACTS OF ASSEMBLY -- 2003 SESSION

CHAPTER 711

An Act to amend and reenact §§ 56-235.5, 56-265.4:4, 56-484.7:1, 56-484.7:2, and 56-484.7:4 of the Code of Virginia, relating to public utilities; communications services.

[H 2397]

Approved March 19, 2003

Be it enacted by the General Assembly of Virginia:

1. That §§ 56-235.5, 56-265.4:4, 56-484.7:1, 56-484.7:2, and 56-484.7:4 of the Code of Virginia are amended and reenacted as follows:

§ 56-235.5. Telephone regulatory alternatives.

A. As used in this section, "telephone company" means any public service corporation or public service company which holds a certificate of public convenience and necessity to furnish local exchange telephone service, except that companies which are regulated pursuant to Chapter 16 (§ 56-485 et seq.) or 19 (§ 56-531 et seq.) of this title are not included within this definition.

B. In regulating telephone services of any telephone company, and notwithstanding any provision of law to the contrary, the Commission, after giving notice and an opportunity for hearing, may replace the ratemaking methodology set forth in § 56-235.2 with any alternative form of regulation which: (i) protects the affordability of basic local exchange telephone service, as such service is defined by the Commission; (ii) reasonably ensures the continuation of quality local exchange telephone service; (iii) will not unreasonably prejudice or disadvantage any class of telephone company customers or other providers of competitive services; and (iv) is in the public interest. Alternatives may differ among telephone companies and may include, but are not limited to, the use of price regulation, ranges of authorized returns, categories of services, price indexing or other alternative forms of regulation. A hearing under this section shall include the right to present evidence and be heard. Prior to any hearing under this section, the Commission shall provide parties an opportunity to conduct discovery.

C. Any telephone company or company regulated pursuant to Chapter 16 (§ 56-485 et seq.) or 19 (§ 56-531 et seq.) of this title may apply to the Commission at any time to obtain an alternative form of regulation. The Commission shall approve the application if it finds, after notice to all affected parties and hearing, that the proposal meets the standards for an alternative form of regulation set forth in subsection B.

1. A Commission order, including appropriate findings of fact and conclusions of law, denying or approving, with or without modification, an application for an alternative form of regulation shall be entered no more than ~~ninety~~ 90 days from the filing of the application, except that the Commission, upon notice to all parties in interest, may extend that period in additional ~~thirty~~ 30-day increments not to exceed an additional ~~ninety~~ 90 days in all.

2. If the Commission approves the application with modifications, the telephone company, or company regulated pursuant to Chapter 16 (§ 56-485 et seq.) or 19 (§ 56-531 et seq.) of this title, may, at its option, withdraw its application and continue to be regulated under the form of regulation that existed immediately prior to the filing of the application, unless it is modified for a telephone company by the Commission pursuant to subsection B.

D. The Commission may, after notice and opportunity for hearing, alter, amend or revoke any alternative form of regulation previously implemented if it finds that (i) the affordability of basic local exchange service, as such service is defined by the Commission, is threatened by the alternative form of regulation; (ii) the quality of local exchange telephone service has deteriorated or will deteriorate to the point that the public interest will not be served by continuation of the alternative form of regulation; (iii) the terms ordered by the Commission in connection with approval of a company's application for alternative form of regulation have been violated; (iv) any class of telephone company customers or other providers of competitive services are being unreasonably prejudiced or disadvantaged by the alternative form of regulation; or (v) the alternative form of regulation is no longer in the public interest.

E. The Commission shall have the authority, after notice to all affected parties and an opportunity for hearing, to determine whether any telephone service of a telephone company is subject to competition and to provide, either by rule or case-by-case determination, for deregulation, detariffing, or modified regulation determined by the Commission to be in the public interest for such competitive services.

F. The Commission may determine telephone services of any telephone company to be competitive when it finds competition or the potential for competition in the market place is or can be an effective regulator of the price of those services. Such determination may be made by the Commission on a statewide or a more limited geographic basis, such as one or more political subdivisions or one or more telephone exchange areas, *or on the basis of a category of customers, such as business or residential customers, or customers exceeding a revenue or service quantity threshold, or some combination thereof.*

The Commission may also determine bundles composed of a combination of competitive and noncompetitive services to be competitive if the noncompetitive services are available separately pursuant to tariff or otherwise. In determining whether competition effectively regulates the prices of services, the Commission shall consider: (i) the ease of market entry, (ii) the presence of other providers reasonably meeting the needs of consumers, and (iii) other factors the Commission considers relevant. Notwithstanding any other provisions of this subsection, any telephone services that are the functional equivalent of the services ~~provided~~ offered individually or as part of a bundle of services by a county, city or town pursuant to § 56-265.4:4 or Article 5.1 (§ 56-484.7:1 et seq.) of Chapter 15 of this title, either directly or pursuant to a public-private partnership, shall be deemed competitive services in the geographic area where the services of the county, city or town are offered for purposes of this article and any alternate regulatory plans approved by the Commission.

G. The Commission shall monitor the competitiveness of any telephone service previously found by it to be competitive under any provision of subsection F above and may change that conclusion, if, after notice and an opportunity for hearing, it finds that competition no longer effectively regulates the price of that service.

H. Whenever the Commission adopts an alternative form of regulation pursuant to subsection B or C above, or determines that a service is competitive pursuant to subsections E and F above, the Commission shall adopt safeguards to protect consumers and competitive markets. At a minimum these safeguards must ensure that there is no cross subsidization of competitive services by monopoly services.

§ 56-265.4:4. Certificate to operate as a telephone utility.

A. The Commission may grant certificates to competing telephone companies, or any county, city or town that operates an electric distribution system, for interexchange service where it finds that such action is justified by public interest, and is in accordance with such terms, conditions, limitations, and restrictions as may be prescribed by the Commission for competitive telecommunications services. A certificate to provide interexchange services shall not authorize the holder to provide local exchange services. The Commission may grant a certificate to a carrier, or any county, city or town that operates an electric distribution system, to furnish local exchange services as provided in subsection B.

B. 1. After notice to all local exchange carriers certificated in the Commonwealth and other interested parties and following an opportunity for hearing, the Commission may grant certificates to any telephone company, or any county, city or town that operates an electric distribution system, proposing to furnish local exchange telephone service in the Commonwealth. In determining whether to grant a certificate under this subsection, the Commission may require that the applicant show that it possesses sufficient technical, financial, and managerial resources. Before granting any such certificate, the Commission shall: (i) consider whether such action reasonably protects the affordability of basic local exchange telephone service, as such service is defined by the Commission, and reasonably assures the continuation of quality local exchange telephone service; and (ii) find that such action will not unreasonably prejudice or disadvantage any class of telephone company customers or telephone service providers, including the new entrant and any incumbent local exchange telephone company, and is in the public interest. *Except as provided in subsection A of § 15.2-2160*, all local exchange certificates granted by the Commission after July 1, 2002, shall be to provide service in any territory in the Commonwealth unless the applicant specifically requests a different certificated service territory. The Commission shall amend the certificated service territory of each local exchange carrier that was previously certificated to provide service in only part of the Commonwealth to permit such carrier's provision of local exchange service throughout the Commonwealth beginning on September 1, 2002, unless that local exchange carrier notifies the Commission prior to September 1, 2002, that it elects to retain its existing certificated service territory. A local exchange carrier shall only be considered an incumbent in any certificated service territory in which it was considered an incumbent prior to July 1, 2002.

2. A Commission order, including appropriate findings of fact and conclusions of law, denying or approving, with or without modification, an application for certification of a new entrant shall be entered no more than 180 days from the filing of the application, except that the Commission, upon notice to all parties in interest, may extend that period in additional ~~thirty~~ 30-day increments not to exceed an additional ~~ninety~~ 90 days in all.

3. The Commission shall (i) promote and seek to assure the provision of competitive services to all classes of customers throughout all geographic areas of the Commonwealth by a variety of service providers; (ii) require equity in the treatment of the certificated local exchange telephone companies so as to encourage competition based on service, quality, and price differences between alternative providers; (iii) consider the impact on competition of any government-imposed restrictions limiting the markets to be served or the services offered by any provider; (iv) determine the form of rate regulation, if any, for the local exchange services to be provided by the applicant and, upon application, the form of rate regulation for the comparable services of the incumbent local exchange telephone company provided in the geographical area to be served by the applicant; and (v) promulgate standards to assure that there is no cross-subsidization of the applicant's competitive local exchange telephone services by any other of its services over which it has a monopoly, whether or not those services are telephone services. The Commission shall also adopt safeguards to ensure that the prices charged and the revenue

received by a county, city or town for providing telecommunications services shall not be cross-subsidized from other revenues of the county, city or town or affiliated entities, except (i) in areas where no offers exist from for-profit providers of such telecommunications services, or (ii) as authorized pursuant to subdivision 4 of this subsection.

4. Upon the Commission's granting of a certificate to a county, city or town under this section, such county, city, or town (i) shall be subject to regulation by the Commission for intrastate telecommunications services, (ii) shall have the same duties and obligations as other certificated providers of telecommunications services, (iii) shall separately account for the revenues, expenses, property, and source of investment dollars associated with the provision of such services, and (iv) to ensure that there is no unreasonable advantage gained from a government agency's taxing authority and control of government-owned land, shall charge an amount for such services that (a) does not include any subsidies, unless approved by the Commission, and (b) takes into account, by imputation or allocation, equivalent charges for all taxes, pole rentals, rights of way, licenses, and similar costs incurred by for-profit providers. *Each certificated county, city, or town that provides telecommunications services regulated by the Commission shall file an annual report with the Commission demonstrating that the requirements of clauses (iii) and (iv) of this subdivision have been met.* The Commission may approve a subsidy under this section if deemed to be in the public interest and provided that such subsidy does not result in a price for the service lower than the price for the same service charged by the incumbent provider in the area.

5. *A locality that has obtained a certificate pursuant to this section shall (i) comply with all applicable laws and regulations for the provision of telecommunications services; (ii) make a reasonable estimate of the amount of all federal, state, and local taxes (including income taxes and consumer utility taxes) that would be required to be paid or collected for each fiscal year if the locality were a for-profit provider of telecommunications services, (iii) prepare reasonable estimates of the amount of any franchise fees and other state and local fees (including permit fees and pole rental fees), and right-of-way charges that would be incurred in each fiscal year if the locality were a for-profit provider of telecommunications services, (iv) prepare and publish annually financial statements in accordance with generally accepted accounting principles showing the results of operations of its provision of telecommunications services, and (v) maintain records demonstrating compliance with the provisions of this section that shall be made available for inspection and copying pursuant to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).*

6. *Each locality that has obtained a certificate pursuant to this section shall provide nondiscriminatory access to for-profit providers of telecommunications services on a first-come, first-served basis to rights-of-way, poles, conduits or other permanent distribution facilities owned, leased or operated by the locality unless the facilities have insufficient capacity for such access and additional capacity cannot reasonably be added to the facilities.*

7. *The prices charged and the revenue received by a locality for providing telecommunications services shall not be cross-subsidized by other revenues of the locality or affiliated entities, except (i) in areas where no offers exist from for-profit providers of such telecommunications services, or (ii) as permitted by the provisions of subsection B 4.*

8. The Commission shall promulgate rules necessary to implement this ~~subsection~~ section. *In no event, however, shall the rules necessary to implement subdivisions B 4 iii and iv, B 5 ii through v, and B 7 impose any obligations on a locality that has obtained a certificate pursuant to this section, but is not yet providing telecommunications services regulated by the Commission.*

C. Article 5.1 (§ 56-484.7:1 et seq.) of Chapter 15 of this title shall not apply to a county, city or town that has obtained a certificate pursuant to this section.

§ 56-484.7:1. Offering of communications services.

A. A county, city, town, electric commission or board, industrial development authority, or economic development authority, *other than one in a locality that (i) is eligible to provide telecommunications services pursuant to § 15.2-2160 and (ii) has a population in excess of 30,000*, may offer qualifying communications services, or enter into public-private partnerships to offer such qualifying communications services, in accordance with the provisions of this article. For purposes of this article, a "qualifying communications service" is a communications service, which shall include but is not limited to, high-speed data service and Internet access service, of general application. The county, city, town, electric commission or board, industrial development authority, or economic development authority shall demonstrate in its petition that the qualifying communications services do not meet the standard set forth in § 56-484.7:2 within the geographic area specified in the petition. No such services shall be offered unless, prior to offering such services: (i) the county, city, town, electric commission or board, industrial development authority or economic development authority petitions the Commission to approve the offering of such qualifying communications services within a specified geographic area and (ii) the Commission, after notice and an opportunity for hearing in the affected area, issues a written order approving the petition or fails to approve or disapprove the petition within ~~sixty~~ 60 days after notice. The ~~sixty~~ 60-day period may be extended by Commission order for a period not to exceed an additional ~~sixty~~ 60 days. The petition shall be deemed approved if the Commission fails to act within ~~sixty~~ 60

days after notice or any extended period ordered by the Commission.

B. Each county, city, town, electric commission or board, industrial development authority, or economic development authority that provides communications services pursuant to this article shall provide nondiscriminatory access to for-profit providers of communications services on a first-come, first-served basis to rights-of-way, poles, conduits or other permanent distribution facilities owned, leased or operated by the county, city, town, electric commission or board, industrial development authority, or economic development authority unless the facilities have insufficient capacity for such access and additional capacity cannot reasonably be added to the facilities.

C. The prices charged by a county, city, town, electric commission or board, industrial development authority, or economic development authority for providing communications services shall not be set at a price for the service lower than the prices charged by any incumbent provider for a functionally equivalent service that is as generally available from such incumbent as it is from such governmental entity.

D. No county, city, town, electric commission or board, industrial development authority, or economic development authority providing such qualifying communications services shall acquire by eminent domain the facilities or other property of any communications service provider to offer cable, telephone, data transmission or other information or online programming services.

E. The Commission may promulgate rules necessary to implement this section.

§ 56-484.7:2. Approval.

The Commission shall find that it is in the public interest to approve the offering of qualifying communications services as defined in § 56-484.7:1 unless it shall be demonstrated to the Commission and found that, within the geographic area specified in the petition: (i) the qualifying communications service specified in the petition as provided for in § 56-484.7:1 is readily and generally *in the specified geographic area* available from *each of* three or more nonaffiliated companies ~~in a manner that~~ and is functionally and economically equivalent for consumers *in that specified geographic area to one or more services offered by each of the three or more competitors*; (ii) the petition is not in compliance with the requirements of § 56-484.7:1; or (iii) the offering of the proposed qualifying communications services will not benefit consumers.

§ 56-484.7:4. Revocation of Commission approval.

The Commission may revoke its approval of a petition under § 56-484.7:1 no earlier than five years after such approval if it finds (i) that the factors described in § 56-484.7:2 on which the approval was based no longer exist or are no longer being satisfied, or (ii) that the petitioner has not made satisfactory progress toward making generally available the qualifying communications services specified in the petition. If the Commission finds that such approval should be revoked, it shall determine a date by which the county, city, town, electric commission or board, or authority shall cease to offer such qualifying communications services. In determining such date the Commission shall allow a reasonable time for the entity to offer its equipment, infrastructure and other assets related to such qualifying communications services for sale at fair market value, which shall be deemed to be no less than the amount of the ~~cost, including~~ indebtedness, for such equipment, infrastructure and other assets related to such qualifying communications services. The provisions of this section shall not apply to the use of telecommunications equipment and services for intragovernmental purposes as specified in § 15.2-1500.