

VIRGINIA ACTS OF ASSEMBLY -- 2003 SESSION

CHAPTER 677

An Act to amend and reenact §§ 56-265.4:4 and 56-484.7:1 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 21 of Title 15.2 an article numbered 1.1, consisting of sections numbered 15.2-2108.2 through 15.2-2108.17, relating to telecommunications services; certificate.

[S 875]

Approved March 19, 2003

Be it enacted by the General Assembly of Virginia:

1. That §§ 56-265.4:4 and 56-484.7:1 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding in Chapter 21 of Title 15.2 an article numbered 1.1, consisting of sections numbered 15.2-2108.2 through 15.2-2108.17, as follows:

Article 1.1.

Provision of Cable Television Services by Certain Localities.

§ 15.2-2108.2. Definitions.

As used in this article:

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

"Cable television service" means (i) the one-way transmission to subscribers of video programming or other programming service; and (ii) subscriber interaction, if any, that is required for the selection or use of the video programming or other programming service.

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

"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.

"Direct costs" means those expenses of a municipality that are directly attributable to providing a cable television service and would be eliminated if such service were not provided by the municipality.

"Feasibility consultant" means an individual or entity with expertise in the processes and economics of providing cable television service.

"Full-cost accounting" means the accounting of all costs incurred by a municipality in providing a cable television service. The costs included in a full-cost accounting include all capital costs, direct costs, and indirect costs.

"Indirect costs" means any costs identified with two or more services or other functions; and that are not directly identified with a single service or function. "Indirect costs" may include cost factors for administration, accounting, personnel, purchasing, legal support, and other staff or departmental support.

"Private provider" means a private entity that provides cable television services.

"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.

"Subscriber" means a person who lawfully receives cable television services.

§ 15.2-2108.3. Scope of article.

A. Nothing in this article shall authorize any county or other political subdivision of the Commonwealth to (i) provide a cable television service; or (ii) purchase, lease, construct, maintain, or operate a facility for the purpose of providing a cable television service.

B. Nothing in this article shall apply to a municipality purchasing, leasing, constructing, or equipping facilities that are designed to provide services within the municipality, and 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 cable television services.

§ 15.2-2108.4. Limitations on providing cable television services.

A. Except as provided in this article, a municipality shall not (i) provide a cable television service; or (ii) purchase, lease, construct, maintain, or operate any facility for the purpose of providing a cable television service to one or more subscribers.

B. For purposes of this article, a municipality provides a cable television service if the municipality provides the service:

1. Directly or indirectly, including through an authority or instrumentality acting on behalf of the municipality or acting for the benefit of the municipality; or

2. By itself, through a partnership, joint venture, or by contract, resale, or otherwise.

§ 15.2-2108.5. Preliminary public hearing; feasibility consultant.

A. Before a municipality may engage or offer to engage in an activity described in subsection A of § 15.2-2108.4, the governing body of the municipality shall hold a preliminary public hearing at which any interested party may appear and be heard.

B. If the governing body elects to proceed after holding the preliminary public hearing required by subsection A, the governing body shall approve the hiring of a feasibility consultant to conduct a feasibility study in accordance with § 15.2-2108.6.

§ 15.2-2108.6. Feasibility study on providing cable television services.

A. Upon the hiring of a feasibility consultant under § 15.2-2108.5, the governing body of the municipality shall require the feasibility consultant to:

1. Complete the feasibility study in accordance with this section;
2. Submit to the governing body by no later than 180 days from the date the feasibility consultant is hired to conduct the feasibility study the full written results of the feasibility study, and a summary of the results that is no longer than one page in length; and
3. Attend the public hearings required by § 15.2-2108.7, if held, to: (i) present the feasibility study results and (ii) respond to questions from the public.

B. The feasibility study described in subsection A shall at a minimum consider:

1. 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;
2. Whether but for the municipality any person would provide the proposed cable television services;
3. The fiscal impact on the municipality of: (i) the capital investment in facilities that will be used to provide the proposed cable television services or (ii) the expenditure of funds for labor, financing, and administering the proposed cable television services;
4. The projected growth in demand in the municipality for the proposed cable television services;
5. The projections at the time of the feasibility study, and for the five years immediately thereafter, of a full-cost accounting for a municipality to purchase, lease, construct, maintain, or operate the facilities necessary to provide the proposed cable television services; and
6. The projections at the time of the feasibility study and for the five years immediately thereafter of the revenues to be generated from the proposed cable television services.

C. For purposes of the financial projections required under subdivisions B 5 and B 6 of this section, the feasibility consultant shall assume that the municipality will price the proposed cable television services consistent with subsection E of § 15.2-2108.11.

D. The governing body of the municipality shall determine whether the average annual revenues under subsection B 6 exceed the average annual costs under subsection B 5 by at least the amount necessary to meet the bond obligations of any bonds issued to fund the proposed cable television services based on the feasibility study's analysis for the first year of the study and the five-year projection, and separately stated with respect to the proposed cable television services.

§ 15.2-2108.7. Public hearings on feasibility study; notice.

A. If the results of the feasibility study satisfy the revenue requirements of subsection D of § 15.2-2108.6, the governing body shall, at the next regular meeting after the governing body receives the results of the feasibility study, schedule at least two public hearings to be held at least seven days apart, but both shall be held not more than 60 days from the date of the meeting at which the public hearings are scheduled. The purpose of such public hearings shall be to allow the feasibility consultant to present the results of the feasibility study, and to inform the public about the feasibility study results and offer the public the opportunity to ask questions of the feasibility consultant about the results of the feasibility study.

B. Except as provided in subsection C, the municipality shall publish notice of the public hearings required under subsection A at least once a week for three consecutive weeks in a newspaper of general circulation in the municipality. The last publication of notice required under this subsection shall be at least three days before the first public hearing required under subsection A.

C. 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. The municipality shall post the notices at least seven days before the first public hearing required under subsection A is held.

D. After holding the public hearings required by this section, if the governing body of the municipality elects to proceed, the municipality shall adopt by resolution the feasibility study.

§ 15.2-2108.8. Referendum.

A. Before a municipality may offer cable television service, the governing body of the municipality shall by a majority vote call an election on whether or not the municipality shall provide the proposed cable television services.

B. When under subsection A the governing body calls an election, the election shall be held:

1. At the next municipal general election or as provided in Article 5 (§ 24.2-681 et seq.) of Chapter

6 of Title 24.2 at a local special election the purpose of which is authorized by this section; and

2. In accordance with the law of Virginia regarding elections in Title 24.2 and as provided in this section.

C. The notice of the election shall include with any other information required by law:

1. A summary of the cable television services that the governing body of the municipality proposes to provide to subscribers residing within the boundaries of the municipality;

2. The feasibility study summary under § 15.2-2108.6;

3. A statement that a full copy of the feasibility study is available for inspection and copying; and

4. 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 this municipality provide cable television service to the inhabitants of the municipality?"

E. The ballot proposition shall not take effect until submitted to the electorate and approved by the majority of those voting on the ballot.

§ 15.2-2108.9. Enterprise funds for cable television services.

A. A municipality that provides a cable television service under this article shall:

1. Establish an enterprise fund to account for the municipality's operations of a cable television service; and

2. Adopt separate operating and capital budgets for the municipality's cable television services.

B. A municipality that provides a cable television service under this article shall not:

1. Transfer any appropriation or other balance in any enterprise fund established by the municipality under this section to another enterprise fund; or

2. 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.

The restrictions on transfers described in this subsection do not apply to transfers made by a municipality between other enterprise funds established by the municipality.

C. A municipality authorized pursuant to subsection E of § 56-265.4:4 to provide cable television service shall:

1. Establish a separate department within an enterprise fund to account for the municipality's operations of a cable television service. This department may share a common balance sheet with other telecommunications and communications services, but the income statements must be stated separately; and

2. Adopt separate operating and capital budgets for the municipality's cable television services.

D. A municipality authorized pursuant to subsection E of § 56-265.4:4 to provide cable television service shall not transfer funds from other departments to the cable television department, but the municipality may make interdepartmental loans at market rates, upon such terms and conditions as would prevail from a private lender.

§ 15.2-2108.10. Bonding authority.

A. The governing 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 cable television service. Such resolution shall: (i) describe the purpose for which the indebtedness is to be created and (ii) specify the dollar amount of the one or more bonds proposed to be issued.

B. A bond issued under this section shall be secured and paid for solely from the revenues generated by the municipality from providing cable television services with respect to bonds issued to finance facilities for the municipality's cable television services. Notwithstanding the foregoing, a municipality authorized under subsection E of § 56-265.4:4 to provide cable television services shall not be subject to the requirement that it secure a bond with solely the revenues generated by the municipality from providing cable television services, and such municipality shall repay the bond indebtedness in a fashion that reflects a reasonable pro rata allocation of such indebtedness by enterprise fund or department.

C. A municipality shall pay that portion of the origination, financing, or other carrying costs associated with one or more bonds issued under this section associated with cable television solely from the funds of the cable television department.

§ 15.2-2108.11. General operating limitations.

A. A municipality that provides a cable television service shall comply with all terms and provisions of the Cable Communications Policy Act of 1984 (47 U.S.C. § 521 et seq.) and the regulations issued by the Federal Communications Commission under such Act that would be applicable to a similarly situated private provider of cable television services.

B. A municipality may not cross subsidize its cable television services with:

1. Tax dollars;

2. Income from other municipal or utility services;

3. Below-market rate loans from the municipality; or

4. Any other means.

C. A municipality shall not make or grant any undue or unreasonable preference or advantage to itself or to any private provider of cable television services.

D. 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 and municipal utility poles and conduits; (iii) permitting; (iv) performance bonding; (v) reporting; and (vi) quality of service.

E. In calculating the rates charged by a municipality for a cable television service:

1. The municipality 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 federal, state, and local taxes; franchise fees; permit fees; pole attachment fees; and any similar fees; and

2. The municipality shall not price any cable television service at a level that is less than the sum of: (i) the actual direct costs of providing the service; (ii) the actual indirect costs of providing the service; and (iii) the amount determined under subdivision E 1.

F. A municipality that provides cable television services shall comply with the provisions of Title 47 of the Code of Federal Regulations regarding rate and service changes.

G. A municipality shall offer to provide or provide cable television services to only those subscriber locations within either (i) the municipality's electric utility service area as it existed on January 1, 2003, or (ii) the area, as of January 1, 2003, in which the municipality was providing local exchange service or Internet service over telecommunications facilities owned by the municipality, provided that a cable television franchise from any jurisdiction other than the municipality authorized herein shall be required for any service outside the municipality's boundaries.

H. A municipality shall keep accurate books and records of the municipality's cable television services. A municipality shall conduct an annual audit of its books and records associated with the municipality's cable television services, such audit to be performed by an independent auditor approved by the Auditor of Public Accounts. Such audit shall include such criteria as the Auditor of Public Accounts deems appropriate and be filed with him, with copies to be submitted to each private provider that holds a franchise to offer service within the municipality. If, after review of such audit, the Commonwealth's Auditor of Public Accounts determines that there are violations of this article, he shall provide public notice of same.

§ 15.2-2108.12. Eminent domain.

A. No municipality shall exercise its power of eminent domain to condemn any plant or equipment of a private provider for the purpose of providing to a subscriber a cable television service.

B. No municipality, for the purpose of providing to a subscriber a cable television service, shall exercise its power of eminent domain to condemn real property, whether in whole or in part, or to obtain an easement.

§ 15.2-2108.13. Quality of service standards.

A municipality that provides a cable television service shall adopt an ordinance governing the quality of service the municipality shall provide to its subscribers, which standard of quality shall be no more favorable or less burdensome to the municipality than the standard of quality applied to any other private providers within the municipality.

§ 15.2-2108.14. Civil action.

A private provider may file an action against a municipality in the circuit court having jurisdiction over the municipality for equitable relief, including a restraining order and injunction, for a violation of the provisions of this article. At least 10 days before filing such action the private provider shall file a written notice thereof with the municipality.

§ 15.2-2108.15. Consumer complaints.

A municipality that provides cable television service shall enact an ordinance establishing a procedure for the filing and resolution of complaints relating to the municipality's provision of cable television service. Such ordinance shall comply with Title 47 of the Code of Federal Regulations and shall be no more favorable or less burdensome to the municipality than such procedure applicable to any private provider providing service in the municipality.

§ 15.2-2108.16. Annual Report.

A municipality that provides cable television service shall provide to a private provider the same information required to be filed with the municipality by that private provider under the terms of its franchise.

§ 15.2-2108.17. Antitrust immunity.

A municipality that provides a cable television service is subject to applicable antitrust liabilities and immunities from liabilities under the federal Local Government Antitrust Act of 1984 (15 U.S.C. § 34 et seq.).

§ 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. 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. 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. The Commission shall promulgate rules necessary to implement this subsection.

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.

D. Any county, city, or town that has obtained a certificate pursuant to this section may construct, own, maintain, and operate a fiber optic or communications infrastructure to provide consumers with Internet services, data transmission services, and any other communications service that its infrastructure is capable of delivering; provided, however, nothing in this subsection shall authorize the provision of cable television services or other multi-channel video programming service. Furthermore, nothing in this subsection shall alter the authority of the Commission.

E. Any county, city, or town that has obtained a certificate pursuant to this section and that had

installed a cable television headend prior to December 31, 2002, is authorized to own and operate a cable television system or other multi-channel video programming service and shall be exempt from the provisions of §§ 15.2-2108.4 through 15.2-2108.8. Nothing in this subsection shall authorize the Commission to regulate cable television service.

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

A county, city, town, electric commission or board, industrial development authority, or economic development authority 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, *but excluding any cable television or other multi-channel video programming services*. 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.