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February 3, 2015

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, NW
Washington, D.C., 20554

Re: *Notice of Ex Parte Communication*
WCB Nos. 14-115 (City of Wilson)

Dear Secretary Dortch:

This responds to the telephone call that I received yesterday from Claudia Pabo (Wireless Carrier Bureau) requesting further clarification of how the financing provisions of S.L. 2011-84 operate. In our discussion of these provisions in our *Notice of Ex Parte Communications* dated December 15, 2014, we noted that these provisions impose time-consuming and burdensome barriers to the ability of municipalities in North Carolina to make timely broadband investments.

In interpreting the pertinent language (codified in G.S. § 160A-340.4), the City of Wilson took into account the Legislative Fiscal Note that explained the purposes and workings of H.129, the bill that became S.L. 2011-84.¹ Among other things, the Fiscal Note indicated that “The new financial standards set forth in HB 129 require that municipal broadband companies: Eliminate the practice of using certificates of participation to finance the construction of a system.” Certificate of Participation (COP) financing is a popular form of funding municipal infrastructure projects in North Carolina and elsewhere, as it insulates taxpayers from the risks of project failure and does not require time-consuming and burdensome referenda. Wilson had used COP financing to develop its fiber network, and Section 160A-340.4 shut the door on that option for other municipalities. So, mindful of the potential for protracted, costly litigation over any ambiguities in the law, Wilson and other municipalities in North Carolina have interpreted G.S. § 160A-340.4 broadly in the light of its plainly intended purpose – to preclude municipalities from using financing options that protect taxpayers from the risks of project failure and, at the same time, do not require compliance with onerous referendum requirements.

¹ A copy of the fiscal note is attached, with the pertinent portion highlighted.

THE BALLER HERBST LAW GROUP

A PROFESSIONAL CORPORATION

February 3, 2015

Page 2

Even if the language of G.S. § 160A-340.4 did not preclude North Carolina municipalities from using financing options other than general obligation bonds, the practical realities underlying G.S. § 160A-340.4 would preclude any such use. To appreciate why this is so, one must first understand that general obligation bonds are backed by the full faith and credit of the municipality, while COP financing, revenue bonds, and other financing options available to municipalities typically are backed only by project revenues and assets. Lenders recognize this distinction by charging lower interest rates for general obligation bonds than they do for other financing options.

Against this backdrop, Section 160A-340.4 has essentially made it impossible for any rational North Carolina municipality to choose any of the alternatives to general obligation bonds. Doing so would not relieve the municipality of the referendum and other time-consuming and cumbersome procedural requirements that apply to general obligation bonds, but complying with these requirements would not enable the municipality to obtain the benefits of using general obligation bonds – particularly lower interest rates.

In sum, as we pointed out in our submission of December 14, 2014, G.S. § 160A-340.4 precludes municipalities from protecting taxpayers from the risks of project failure and, at the same time, requires municipalities to conduct referenda in which the main issue is likely to be that the project will expose taxpayers to project risks! That is unfair and contrary to the letter and spirit of Section 706.

Sincerely,

A handwritten signature in black ink that reads "James Baller". The signature is written in a cursive, flowing style.

James Baller

Attachments

GENERAL ASSEMBLY OF NORTH CAROLINA



Session 2011

Legislative Fiscal Note

BILL NUMBER: House Bill 129 (Fourth Edition)

SHORT TITLE: Level Playing Field/Local Gov't Competition.

SPONSOR(S): Representatives Avila, Howard, Carney, and Wainwright

FISCAL IMPACT					
	Yes (X)	No ()	No Estimate Available ()		
	<u>FY 2011-12</u>	<u>FY 2012-13</u>	<u>FY 2013-14</u>	<u>FY 2014-15</u>	<u>FY 2015-16</u>
REVENUES					
Current Municipal Broadband Systems Estimate Adverse Financial Implications					
Payment in Lieu of Taxes Estimated at \$18.98 per Subscriber for Future Systems					
EXPENDITURES					
POSITIONS (cumulative):					
PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED:					
North Carolina Department of Revenue; North Carolina Department of State Treasurer, Local Government Commission					
EFFECTIVE DATE:					
When the bill becomes law.					

BILL SUMMARY: House Bill (HB) 129 implements new regulatory, public information, and financial requirements for cities and joint agencies providing communication services to the public for a fee. Four cities/joint agencies, Morganton (CoMPAS Cable TV), Salisbury (Fibrant), Wilson (Greenlight), and Mooresville-Davidson (MI Connection), currently offer municipal broadband services that could fall within the purview of HB 129. The bill specifically exempts these groups by exempting entities providing telecom services prior to January 1, 2011 from a majority of the provisions set forth in the bill. The main limitation of existing municipal broadband companies applies to their service areas.

Cities offering communications service as of January 1, 2011 are exempt from all of the provisions in the bill provided that the city limits services to any one or more of the following:

- Persons within the corporate limits of the city providing the service.
- Existing customers of the service as of April 1, 2011, provided that contracts outside the service area is subject to public bidding upon expiration.

- For MI-Connection – the PCS expands the service area to the combined areas of the city of Cornelius; the town of Troutman; the town of Huntersville; the unincorporated areas of Mecklenburg County north of a line beginning at Highway 16 along the west boundary of the county, extending eastward along Highway 16, continuing east along Interstate 485, and continuing eastward to the eastern boundary of the county along Eastfield Road; and the unincorporated areas of Iredell County south of Interstate 40, excluding Statesville and the extraterritorial jurisdiction of Statesville.
- For the city of Salisbury – the cities of Salisbury, Spencer, East Spencer, Rockwell, Granite Quarry, and the corridors between those cities to the extent necessary to serve those cities.
- For all other cities and joint agencies – the area designated in the map filed with the notice of franchise.

The new regulations set forth in HB 129 require that future municipal broadband systems:

- Comply with all State, local and federal laws and regulations adhered to by private communication companies.
- Establish separate enterprise funds for the communications service, and conduct annual audits.
- Limit the communication services to the jurisdictional boundaries of the city.
- Eliminate the practice of requiring individuals or developments subscribe to municipal broadband services.
- Provide other service providers with access to the city’s rights-of-way, conduits, and other distribution facilities.
- Prohibit advertisements for municipal broadband on the public, education, and government (PEG) channels of competing providers.
- Limit the revenue used to finance communication services to the income generated from the service.
- Price municipal communication services a rate equal to the cost of providing the service. The price should include adjustments for capital costs and taxes incurred in the private sector.

The new public information standards set forth in HB 129 require that municipal broadband companies:

- Hold two public hearings prior to offering services.
- Provide notice for the public hearings in local newspaper and with the Utilities Commission.
- Provide the public with all feasibility studies, business plans, and surveys prior to the hearings.
- Allow private communications providers to participate in the hearing.

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2011

Legislative Fiscal Note

The new financial standards set forth in HB 129 require that municipal broadband companies:

- Eliminate the practice of using certificates of participation to finance the construction of a system.
- Make payments in lieu of property taxes to the county/counties in which the services are contained.
- Remit to the State payments in lieu of taxes (PiLoTs), an amount set by the Department of Revenue equivalent to the income, franchise, vehicle, motor fuel, and other taxes due if operating as a private enterprise.

ASSUMPTIONS AND METHODOLOGY: Should HB 129 be enacted, future municipal broadband companies operating in North Carolina will be required to make payments in lieu of taxes (PiLoTs) of approximately \$202,000 annually. The \$202,000 estimate represents the average state taxes paid per customer (\$18.98) as calculated by North Carolina's private telecommunication companies multiplied by the average number of subscribers currently served by municipal broadband projects, 10,694 subscribers. The estimate utilizes information provided by the North Carolina Department of State Treasurer Local Government Commission and North Carolina Cable Telecommunications Association. According to the Association, private telecommunication providers pay \$18.84 per subscriber in state and local taxes. Table 1 provides a breakdown of the estimated taxes paid by revenue type.

Table 1: Payment in Lieu of Taxes for Public Entities Providing Communication Services		
Tax	Description	Estimated Tax Revenue per Subscriber
Sales and Use Tax	Governmental entities would no longer be eligible to receive sales and use tax refunds under G.S. 105-164.14(c) for tangible personal property utilized in providing communication services.	\$2.07
Corporate Income Tax	Income generated from providing communication services would no longer be eligible for the income tax exemption for governmental units provided under G.S. 105-103.11, but subject to the 6.9% corporate income tax as described in G.S. 105-103.3.	\$2.91
Franchise Tax	G.S. 105-122 levies a franchise/privilege tax on corporations at a rate of \$1.50 per \$1,000 on one of three bases: 1) the profits apportioned to the State, 2) 55% of the value of real property owned in the state and subject to local property tax, 3) the book value of real and tangible personal property less any debt used to acquire real property in the state.	\$2.21
Property Tax	Government entities would be required to remit taxes on real property (buildings, land, etc.) used in conjunction with providing communication services.	\$11.79
Total Tax Due Per Subscriber		\$18.98
Source: North Carolina Cable Telecommunications Association; Time Warner Cable		

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2011

Legislative Fiscal Note

The four municipal broadband enterprises operating as of January 1, 2011: 1) Morganton (CoMPAS Cable TV), 2) Salisbury (Fibrant), 3) Wilson (Greenlight), and 4) Mooresville-Davidson (MI Connection), collectively serve a region covering 42,761 households. Table 2 provides a snapshot of the regions in which these systems operate, years of operation, number of households served, as well as income and assets for the 2010 fiscal year.

According to representatives from the North Carolina Department of State Treasurer Local Government Commission and the Greenlight and Fibrant municipal broadband systems, the boundaries set forth in the PCS weaken the financial viability of both broadband systems. Greenlight and Fibrant's financial plan estimated service to a larger area than described in the HB 129 PCS. Data limitations hinder the quantification of how the newly described service boundaries will impact the financial viability of Greenlight and Fibrant.

As illustrated by Table 2, Morganton's municipal broadband system, CoMPAS, is the oldest municipal system. CoMPAS operated at a net profit during the 2010 fiscal year. CoMPAS began providing telecommunication services in 1992, financing construction through debt and revenue from other utility services. The city upgraded the system in 2004 using funding provided through low interest debt called certificates of participation (COPs). Morganton made its final COPs payment in December 2010 and expects to generate roughly one million dollars of annual net income in future years.

Table 2. Financial and Customer Data on Existing Municipal Broadband Providers, 2010

Provider	City Detail	Years in Operation	Certificates of Participation (\$ In Millions)	Households in Service Area, 2010	2010 Net Income/ (Loss) (\$ In Millions)	Assets (\$ In Millions)	
						Real Property (Buildings and Land)	Tangible Personal Property
Greenlight (1)	Wilson, Wilson County, NC	2.8 years	31.80	19,799	(1.37)	0.93	8.47
Fibrant (2)	Salisbury, Rowan County, NC	3 months	29.10	7,562	(0.45)	4.59	
MI Connection (3)	Mooresville-Davidson	3.1 years	79.65	9,000 (actual); 13,489 (projected)	(5.60)	0.65	0.701

Continued on next page.

Table 2. Financial and Customer Data on Existing Municipal Broadband Providers, 2010							
Provider	City Detail	Years in Operation	Certificates of Participation (\$ In Millions)	Households in Service Area, 2010	2010 Net Income/ (Loss) (\$ In Millions)	Assets (\$ In Millions)	
						Real Property (Buildings and Land)	Tangible Personal Property
CoMPAS (4)	Morganton, Burke County, NC	Began in 1992 (financed through utility system revenue), system upgrade occurred in 2004	7.32	6,400	0.2	N/A	N/A
Total			\$147.87	42,761	\$ (7.22)		

SOURCES OF DATA:

(1) Numbers represent information gathered through the North Carolina Department of State Treasurer Local Government Commission, City of Wilson Certificates of Participation Application, and City of Wilson, “Comprehensive Annual Financial Report for Fiscal Year Ending June 30, 2010.” Details can be found in the Supplemental Statement of Net Assets for Enterprise Funds, Broadband section. Available at:

<http://www.wilsonnc.org/attachments/pages/556/CAFR%202010%20-%20Supplementary%20Financial%20Information-Proprietary.pdf>.

(2) Numbers represent information gathered through the North Carolina Department of State Treasurer Local Government Commission, City of Salisbury Certificates of Participation Application, and City of Salisbury, “Comprehensive Annual Financial Report for Fiscal Year Ending June 30, 2010.” Available at:

<http://www.ci.salisbury.nc.us/finance/audit/2010/Supplemental.pdf>

(3) Numbers represent information gathered from the City of Mooresville, Certificates of Participation Application, and MI Connection, “Comprehensive Annual Financial Report for Fiscal Year Ending June 30, 2010.” All documents provided by the North Carolina Department of State Treasurer Local Government Commission.

(4) Numbers represent data collected through conversations with Bill Harkins (CoMPAS General Manager) and through the North Carolina Department of State Treasurer Local Government Commission, City of Morganton Certificates of Participation Application, and City of Morganton, “Comprehensive Annual Financial Report for Fiscal Year Ending June 30, 2010.” All documents provided by the North Carolina Department of State Treasurer Local Government Commission.

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Sandra Johnson, Fiscal Analyst II

APPROVED BY:

Lynn Muchmore, Director
Fiscal Research Division

DATE: April 28, 2011



Signed Copy Located in the NCGA Principal Clerk's Offices