STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-100, SUB 169

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Provision of Communications Service	)	ORDER PROMULGATING
By Cities Under G.S. 160A-340	)	RULE R23-1 THROUGH R23-5

BY THE COMMISSION: On May 9, 2011, the General Assembly ratified Session Law 2011-84, House Bill 129 (S.L. 2011-84 or H129), entitled "An Act to Protect Jobs and Investment by Regulating Local Government Competition with Private Business", and the bill became law on May 21, 2011. H129 primarily amended Chapter 160A of the General Statutes by adding a new Article 16A entitled "Provision of Communications Service by Cities."

The new law involves the Commission in two respects. First, G.S. 160A-340.2(b) provides in pertinent part:

> The provisions of G.S. 160A-340.1, 160A-340.4, and 160A-340.5 do not apply to the provision of communications service in an unserved area. A city seeking to provide communications service in an unserved area *shall petition the North Carolina Utilities Commission* for a determination that an area is unserved…. Any private communications service provider, or any other interested party, may, within a time established by order of the Commission, which time shall be no fewer than 30 days, file with the Commission an objection to the designation on the grounds that one or more areas designated in the petition is not an unserved area or that the city is not otherwise eligible to provide the service…. (Emphasis added.)

Second, Section 2(a) of the law amends G.S. 62-3(23) by adding a new subdivision to read: "l. The term 'public utility' shall include a city or a joint agency under Part 1 of Article 20 of Chapter 160A of the General Statutes that provides service as defined in G.S. 62-3(23)a.6. *and is subject to the provisions of G.S. 160A-340.1."* (Emphasis added).

On July 22, 2011, the Commission in an Order Seeking Comments asked the Public Staff to file initial comments setting forth proposed rules and procedures, to be followed by comments from interested parties. The Public Staff was given the opportunity to file reply comments to such comments. Copies of the Order Seeking Comments were sent to all local exchange companies (LECs), all competing local providers (CLPs), the North Carolina League of Municipalities, the Competitive Carriers of the South, Inc. (CompSouth), the North Carolina Telecommunications Industry

Association, Inc. (NCTIA), and the North Carolina Cable Telecommunications Association (NCCTA).

INITIAL COMMENTS BY THE PUBLIC STAFF

The Public Staff filed comments on October 3, 2011, and analyzed the issues in this docket as set forth below. The Public Staff also provided a set of proposed rules specific to the subject matter entitled "Chapter 23. Provision of Communications Services by Cities."

1. Determination of an unserved area. G.S. 160A-340.2(b) provides in part:

> A city seeking to provide communications service in an unserved area shall petition the North Carolina Utilities Commission for a determination that an area is unserved. The petition shall identify with specificity the geographic area for which the designation is sought. Any private communications service provider, or any other interested party, may, within a time established by order of the Commission, which time shall be no fewer than 30 days, file with the Commission an objection to the designation on the grounds that one or more areas designated in the petition is not an unserved area or that the city is not otherwise eligible to provide the service.

The subsection goes on to define the term "unserved area" as "a census block, as designated by the most recent census of the U.S. Census Bureau, in which at least fifty percent (50%) of households either have no access to high-speed Internet service or have access to high-speed Internet service only from a satellite provider." High-speed Internet access service is defined in G.S. 160A-340(4) as "[i]nternet access service with transmission speeds that are equal to or greater than the requirements for basic broadband tier 1 service as defined by the Federal Communications Commission for broadband data gathering and reporting."

To address petitions filed by a city seeking to provide communication services in an unserved area, the Commission must (a) develop a procedural framework, (b) establish a procedure for handling objections, and (c) determine whether the area proposed to be served is an unserved area within the meaning of the Act.

The Public Staff did not suggest the use of any particular form for the petition. Instead, the Public Staff recommended that the form should simply comply with the requirements of Commission Rule R1-5 (Pleadings, generally) and provide sufficient information to demonstrate to the Commission that the area in question meets the definition of unserved area. The Public Staff's proposed rule also requires that the petition include the following information:

- A description of each census block proposed to be included in the unserved area.
- Information on the current availability of high-speed Internet access service at the household level in the proposed unserved area.
- A letter or resolution in support of the determination from the appropriate governing body that is filing the petition.

In addition, the Commission or Public Staff may request additional information as needed.

With regard to objections, the Public Staff noted that it is unclear whether 30 days starts upon the filing of the petition with the Commission, or upon the Commission's determination that an area is unserved. The Public Staff recommended that the Commission, upon the filing of the petition, issue an order giving notice that a petition for a determination of an unserved area has been filed and that persons who wish to file an objection to the petition must file the objection within 30 days of the date of the order.

The proposed rule provides that if an objection to the designation is filed, the Commission will schedule a proceeding and provide notice to the petitioner and to any objecting party. The Commission may also schedule a hearing and require notice of the hearing to be published by the petitioner. After the hearing or proceeding, the Commission will enter an order making the determination whether an area is unserved.

If no objection is filed within the time specified and the Commission does not order a hearing on its own initiative, the Commission will enter an order making the determination whether an area is unserved.

The Public Staff believes that the definitions provided in the Act in G.S. 160A-340 are sufficiently clear to provide the Commission with a basis for making a determination of an unserved area. The definitions are incorporated by reference in proposed Commission Rule R23-2.

2. Notice of Proposals to Provide Communications Service. G.S. 160A-340.3 provides in part:

> A city or joint agency that proposes to provide communications service shall hold not fewer than two public hearings, which shall be held not less than 30 days apart, for the purpose of gathering information and comment. Notice of the hearings shall be published at least once a week for four consecutive weeks in the predominant newspaper of general circulation in the area in which the city is located. The notice shall also be provided to the North Carolina Utilities Commission, which shall post the notice on its Web site, and to all companies that have requested service of the notices from the city clerk. The city shall deposit the notice in the U.S. mail to

companies that have requested notice at least 45 days prior to the hearing subject to the notice.

The Public Staff noted that this provision does not apply to cities or joint agencies that are already providing communications services and are specifically exempted pursuant to G.S. 160A-340.2(c), but it does apply to cities that are seeking to provide communications service in an unserved area and to cities that are seeking to expand or provide service in other areas.[1] The Public Staff noted that the role of the Commission in this context is simply to post notice on its website. Although the Act does not specify how long the Commission must publish the notice, the Act provides that the notice must be deposited in the mail to companies that have requested notice at least 45 days prior to the first hearing. Thus, it seems to follow that the notice should be posted within a reasonable time following the filing of the notice and maintained on the Commission's website through the duration of the hearings, which must be not less than 30 days apart. Proposed Commission Rule R23-4 formalizes this requirement.

3. Public utility status of cities or joint agencies providing communications services. Section 2.(a) of the Act amends G.S. 62-3(23) by adding the following new sub-subdivision:

> l. The term "public utility" shall include a city or a joint agency under Part 1 of Article 20 of Chapter 160A of the General Statutes that provides service as defined in G.S. 62-3(23)a.6. and is subject to the provisions of G.S. 160A-340.1.

As pointed out by the Commission in its July 22, 2011, Order, entities that fall within the definition of a public utility pursuant to G.S. 62-3 are required to comply with the applicable provisions of Chapter 62, which include, but are not limited to, the utility franchise requirements (Article 6), regulation of rates (Article 7), fees and charges (Article 14), and penalties and actions (Article 15). The Public Staff agreed that cities that are subject to G.S. 160A-340.1 must therefore comply with all applicable requirements of Chapter 62. Cities that are subject to G.S. 160A-340.1 appear to include: (a) cities that propose to begin to provide communications services in an area that is not considered unserved; and (b) cities that are currently exempt pursuant to G.S. 160A-340.2(c), but wish to expand or extend their service territories.

[1] The Public Staff observed that notice requirements of G.S. 160A-340.3 also appear to apply to cities that meet the criteria of G.S. 160A-340.2(a) (cities that are seeking to purchase, lease, construct, or operate "facilities by a city to provide communications service within the city's corporate limits for the city's internal governmental purposes, including the sharing of data or voice between governmental entities for internal governmental purposes, or within the corporate limits of another unit of local government that is a party with the city to an interlocal agreement under Part 1 of Article 20 of Chapter 160A of the General Statutes for the provision of internal government services"). These types of services are partially excluded from the definition of "provision of communication service" in G.S. 160A-340(3), but there is some inconsistency between the language in the two provisions. This may have been a technical oversight on the part of the General Assembly.

The Public Staff particularly noted that, pursuant to G.S. 62-2(b1), the Commission does not regulate broadband service provided by public utilities as defined in G.S. 62‑3(23)a.6. There seems to be considerable overlap between the existing definition of "broadband service" in G.S. 62-3(1) and the definition of "communications service" established in the Act. In seeking to harmonize these statutes, the Public Staff proposed that a city that is subject to G.S. 160A-340.1 and provides communications service as described in G.S. 62-3(23)a.6., other than broadband service, be required to comply with the applicable requirements of Chapter 62. This requirement is formalized in its proposed Commission Rule R23-5.

Finally, cities and local agencies that are voice-over-Internet protocol or VoIP service providers are considered voice communications service providers pursuant to G.S. 62A-40(23) and therefore are required to collect and remit the charge for 911 service. A city or local agency that provides voice communications service pursuant to this Act would be subject to the provisions of Chapter 62A.

OTHER COMMENTS

The NCCTA was the only party to file comments in response to the Public Staff's comments. The NCCTA noted that it had been an active participant in the legislative process resulting in the enactment of S.L. 2011-84 and that its members have a direct and substantial interest in the matters addressed by it. While noting that the provisions of the Act are largely self-effectuating, the NCCTA observed that it impacts the Commission in three specific ways. First, it directs the Commission to post on its website any notice provided by a city of its intent to provide communication services covered by the Act. (G.S. 160A-340.3). Second, the Commission must issue a determination on any city's assertion that it seeks to provide communications service in an "unserved" area. (G.S. 160A-340.2(b)). Third, it is clarified that a city is subject to the regulatory authority of the Commission and is deemed to be a public utility to the extent it provides services covered by the Public Utilities Act (G.S. 62-3(23); S.L. 2011-84, at Section 2.(a)).

Website Notice Requirement. This is a relatively straightforward requirement intended to help ensure that providers and citizens are provided notice of potential governmental actions impacting their interests. The NCCTA added that, since the Commission's obligation here is merely to post notices that are provided, it is not necessary for the Commission to resolve interpretive issues raised by the Public Staff in its comments regarding the applicability of the notice requirement. *See* Public Staff Comments, p. 3, footnote 1.

The NCCTA recommended that, rather than merely treating the filings as a newly docketed matter, the Commission should post such notices directly on the Commission's homepage or under a separate link available on the Commission's homepage—for example, under a link labeled "City-owned communications providers notices of service" available under "NCUC News" or "Consumer Information" on the

right-hand side of the homepage. These notices should also be recorded on the Commission's document inventory to facilitate dissemination of the notice.

In general, the NCCTA said it was in agreement with the Public Staff's proposed rule implementing the notice provision, with the exception of subsection (b) of the proposed Rule R23-4. This subsection states that notice under G.S. 160A-340.3 can be filed contemporaneously with a notice seeking determination of an "unserved area." The NCCTA does not believe that this provision correctly interprets the underlying statutory requirement for the following reasons:

First, the notice requirement is intended to provide notice to private providers during the investigation and feasibility stage of consideration of a proposal to provide communications services—that is, *before* a city takes definitive action to approve such a proposal. By contrast, the "unserved area" designation request can be made only *after* a city has complied with the necessary prerequisites required to secure the approval of a proposal to provide communications services. Thus, a city that has not taken action to approve a proposal to provide communications services cannot file an application for designation of an "unserved area" because the city has not taken the essential first step of approving the project in the first place.

Second, in order to move forward with a proposal to provide communications service, a city must comply with the public-private partnership provisions of G.S. 160A-340.6. If there is a private provider that is ready, willing and able to provide service in the area—even an "unserved area"—that provider should be given the opportunity to provide service under the public-private partnership provisions of G.S. 160A-340.6. Thus, it would be premature for a city to seek designation of an "unserved area" prior to obtaining authorization under G.S. 160A-343.3 and G.S. 160A-340.6.

Thus, the NCCTA argued that proposed Rule R23-4(b) conflicts with the specified provisions of S.L. 2011-84 as well as the basic principles of local governance and control. The proposed rule should either be revised to specify compliance with G.S. 160A-343.3 and G.S. 160A-340.6 prior to submitting an application for designation of an "unserved area" or the rule should be silent on the issue.

***"Unserved Areas" Determinations*.** G.S. 160A-340.2(b) directs the Commission to issue a determination of a city's assertion that it seeks to provide communications service to an "unserved" area. The NCCTA is largely in agreement with the Public Staff's proposed rule to implement the provisions of this statute. However, the NCCTA would propose that the Commission afford 60 days, rather than 30 days, to file objections to a proposed designation request, as it has the discretion to do under the statute. The rationale for the longer period relates to the extra time it may take to collect and analyze new relevant information which may not be otherwise in the possession of a particular provider.

The NCCTA also proposed that the reference to a "proceeding" be substituted with reference to a "hearing" consistent with the process utilized by the Commission in contested cases.

***Regulation of Cities as Public Utilities*.** Section 2.(a) of S.L. 2011-84 clarifies that a city is subject to the regulatory authority of the Commission and shall be deemed a public utility to the extent that it provides services covered by the Public Utilities Act.[2] The NCCTA does not believe that any new rules are necessary to effectuate Section 2.(a) or Section 6 of S.L. 2011-84. Cities that wish to provide services covered by Chapter 62 will be required to comply with the provisions of that Chapter, including obtaining a CLP and/or interexchange carrier (IXC) certificate as appropriate. Should the Commission determine that a rule to implement this provision is necessary, the proposed rule should be revised as set forth in the NCCTA's comments.

REPLY COMMENTS BY THE PUBLIC STAFF

Determination of an unserved area. The Public Staff had originally proposed a period of 30 days after the procedural order is issued for a private communications service provider or any other party to file any objections to the Commission's designation that the area is unserved. The NCCTA proposed that the Commission allow 60 days, and the Public Staff did not object.

Website Notice Requirement. The NCCTA had taken issue with the Public Staff's interpretation of the Act's provisions regarding the steps that a city must follow when seeking to provide communications service to an unserved area. The Public Staff had drafted a proposed Commission Rule R23-4(b) to allow a city to file a petition for determination of an unserved area pursuant to Rule R23-3 *contemporaneously* with the notice requirements under Rule R23-4. The NCCTA has argued that the Act requires a city to first complete the notice and hearing requirements under G.S. 160A-340.3 and the solicitation of public-private partnerships in G.S. 160A-340.6 prior to filing a petition for determination with the Commission. While the Public Staff agrees that these provisions apply to the process of seeking to provide service in an unserved area, it does not agree that the statute mandates that these steps must be completed *prior* to the Commission making an unserved area determination. The reason is the difference in wording between G.S. 160A-340.2(b) and 160A-340.3. G.S. 160A-340.2(b), concerning determination that the area is unserved, is keyed to a "city *seeking to provide* communications service" in such area, while G.S. 160A-340.3 concerning notice requirements, is keyed to "a city or joint agency *that proposes to provide* communications service." G.S. 160A-340.6.(a) says that "*[p]rior to undertaking to*

[2] The NCCTA noted that one city, Pineville, is directly identified in the statutes as a public utility. *See* G.S. 62-3(23)f. Under Section 6 of S.L. 2011-84, Pineville continues to be regarded as a public utility under that provision but is not otherwise subject to the provisions of the Act with respect to its operations that are regulated under Chapter 62. The intention of this provision is to continue the scheme of regulation in place for Pineville prior to the Act with respect to the provision of telephone services, which will put Pineville on equal footing with the new cities that desire to provide telephone service in the future.

construct a communications network for the provision of communications service, a city shall first solicit proposals…." (Emphasis added).

The Public Staff argued that there is no significant difference between a city "seeking to provide" and "a city that proposes to provide" communications service. However, the phrase "prior to undertaking to construct" seems to imply that the solicitation of proposals would occur after a city first seeks to provide communications service. There is no statutory basis to preclude a city from seeking an unserved area determination pursuant to G.S. 160A-340.2(b) prior to or contemporaneously with its compliance with the notice requirements of G.S. 160A-340.3.

Public utility status of cities providing communications services. The Public Staff noted that in its initial comments it had identified two categories of cities that are subject to G.S. 160A-340.1—namely, those cities that propose to begin to provide communications services in an area that is not considered unserved and those cities that are currently exempt pursuant to G.S. 160A-340.2(c) but wish to expand or extend the service territory of their communications services. Pursuant to the new G.S. 62-3(23)l., enacted as Section 2.(a) of the Act, these cities are included in the definition of public utility and must comply with all applicable requirements of Chapter 62.

The NCCTA states in Note 4 to its revision of the proposed Rule R23-5 that an exemption from public utility status for cities presently providing communications services is provided not in G.S. 160A-340.2 but rather in Section 6 of the Act. NCCTA would thus eliminate the citation to this section in the rule as the source for the exemption from public utility status for cities presently providing communications services and substitute a citation to "Section 6 of S.L. 2011-84. The Public Staff opposed this revision. In doing so, the Public Staff noted that while it agreed with NCCTA that Sections 5 and 6 of the Act provide an exemption for cities presently providing communications services, it disagrees with the assertion that G.S. 160A-340.1 does not provide an additional basis for exemption. Exemptions from G.S. 160A-340.1 are provided in G.S. 160A-340.2(a) (concerning the provision of communication services by a city for internal governmental purposes), G.S. 160A-340.2(b) (the provision of communications services by a city in an unserved area), and G.S. 160A-340.2(c) (a city that was providing communications service as of January 2011, as long as certain conditions are met). A city that is not subject to the provisions of G.S. 160A-340.1 by virtue of one or more of these exemptions would not be a public utility as defined in G.S. 62-3(23)l. Accordingly, the Public Staff disagreed with the NCCTA's recommendation that the citation to G.S. 160A-340.2 be stricken from the proposed Commission Rule R23-5.

Necessity of adopting rules to implement additional portions of the Act. On pages 3 and 7 of its comments, the NCCTA raises the question of whether it is necessary for the Commission to adopt rules related to aspects of the Act other than the process of making a determination of whether an area is unserved, as described in proposed Rule R23-3. While the Public Staff agreed that much of the statute is

self-effectuating and rules may not be strictly necessary in this regard, the Public Staff believes that codification of the notice requirements proposed in Rule R23-4 and the statement of public utility status in Rule R23-5 may serve to resolve potential procedural questions related to the implementation of the Act.

DISCUSSION

In its comments, the NCCTA identified three key areas of disagreement with the original rule proposed by the Public Staff which have not been eliminated in the most recently revised rule proposed by the Public Staff. First, the NCCTA indicated that it disagreed with the provision of the proposed rule that permits a city seeking to provide communications services to file a petition for determination of an unserved area *contemporaneously* with the notice requirements that the Act requires a city to comply with if it desires to provide communications services. The NCCTA argued that S.L. 2011-84 requires a city desiring to provide communications services to give notice to private communication providers *"before"* a city takes definitive actions to approve a proposal to provide communication services and to give the same providers the opportunity to provide those services through a public-private partnership prior to petitioning the Commission to designate an unserved area. The NCCTA argued that G.S. 160A-340.3 and 160A-340.6, as well as basic principles of local governance and control, support its position that the city must give notice that it is seeking to provide communications service and that the city must give private providers the opportunity to provide necessary communication services even in areas that may be unserved *before* the city can petition the Commission to determine if an area is unserved.

In response to those arguments, the Public Staff pointed out that the General Assembly did not explicitly preclude a city from seeking an unserved area determination pursuant to G.S. 160A-340.2(b) prior to or contemporaneously with its compliance with the notice requirements of G.S. 160A-340.3 when it enacted S.L. 2011-84. In fact, the Public Staff argued, there is much to suggest that the procedure recommended in the proposed rule is not only permitted but contemplated by the Act.

According to the Public Staff, this construction is supported by the similarity in certain key respects between the language in G.S. 160A-340.2 and G.S. 160A-340.3, the sections dealing with the unserved area determination and notice requirements, respectively. G.S. 160A-340.2(b), the unserved area provision, refers to a "city *seeking to provide* communications service" in an unserved area petitioning the Commission for a determination that an area that it might wish to serve is unserved and therefore subject to service possibly without regulatory oversight, while G.S. 160A-340.3 concerning notice requirements, is keyed to "a city or joint agency *that proposes to provide* communications service." The Public Staff pointed out that there is very little difference in that language.

The Commission agrees with the Public Staff. Both phrases seem to suggest that the activity contemplated, i.e., the determination of whether an area is unserved or the notice that a city is proposing to provide communications service, is to be done

while the city is contemplating whether and/or to what extent it should engage in the provision of communications services. Typically, both such activities occur during the information gathering stage *before* a concrete decision *to provide communication service* has been definitively made. By contrast, the language cited in G.S. 160A-340.6, the section dealing with public-private partnerships, states that "prior to undertaking to construct …, a city shall first solicit proposals…" This language implies that the necessary preliminary information that the previously cited sections were designed to solicit has been gathered, assessed and the decision has been made to provide communication services. Typically, this occurs *after* the information gathering has been completed.

In our view, it is logical to construe the language in the manner suggested by the Public Staff since such a construction would expedite rather than hinder the provision of communication services by either the city or through a public-private partnership to areas subsequently determined to be unserved. Moreover, such a construction would permit the city and the private provider to more accurately assess potential financial and service obligations prior to undertaking to construct or extend a communications network. Thus, we reject the NCCTA's objection to the provision in the proposed rule that allows a city to file a petition for determination of an unserved area pursuant to Rule R23-3 *contemporaneously* with the notice requirements under Rule R23-4.

Second, in Note 4 to its revision of the proposed Rule R23-5, the NCCTA stated that an exemption from public utility status for cities presently providing communications services is not provided in G.S. 160A-340.2 as contended by the Public Staff but in Section 6 of the Act. Because of this, the NCCTA suggested that the Proposed Rule be revised to eliminate the citation to this section and instead substitute a generic reference to "Section 6 of S.L. 2011-84" as the source of the exemption from public utility status for cities presently providing communications services. Similarly, in Note 5 to its revision of the proposed Rule R23-5, the NCCTA suggested that the citation to G.S. 62-2(b1) be eliminated in the Proposed Rule because it was not necessary and could be confusing since that particular section of the statute which provides that the Commission shall not regulate broadband does not operate as a general exclusion from all regulation.

In its Reply Comments, the Public Staff identified Section 5 as well as Section 6 of the Act as exemption sources for cities presently providing communications services. It also noted that additional bases for exemption are provided in G.S. 160A-340.2(a) (concerning the provision of communications services by a city for internal governmental purposes), G.S. 160A-340.2(b) (the provision of communications services by a city in an unserved area), and G.S. 160A-340.2(c) (a city that was providing communications service as of January 2011, as long as certain conditions are met). A city that is privy to one or more of these exemptions would not be a public utility as defined in G.S. 62-3(23)l. Accordingly, the Public Staff disagreed with the NCCTA's recommendation that the citation to G.S. 160A-340.2 be stricken from the proposed Commission Rule R23-5.

We agree with the Public Staff. While it is indeed correct that Section 6 of the Act explicitly exempts cities presently providing communications services from public utility status, the Act itself provides a more comprehensive offering detailing precisely the circumstances in which a city (or cities) which is (are) presently providing communications services are exempt from public utility status and the regulatory oversight that such a designation involves. For that reason, we see nothing confusing or wrong with the expansive exemption listing that the Public Staff's revision to the proposed rule has adopted and thus reject the limitation proposed by the NCCTA to Rule R23-5.

Finally, because much of the Act is self-effectuating, the NCCTA questioned the general necessity for the Commission to adopt rules related to aspects of the Act other than the process of making a determination of whether an area is unserved, as described in proposed Rule R23-3. The NCCTA observed that cities desiring to provide services covered by Chapter 62, the Public Utilities Act, will be required to comply with the provisions of the Chapter, including obtaining a Competitive Local Provider and/or interexchange carrier certificate as appropriate. While we agree that much of the Act is self-effectuating and that cities desiring to provide services covered by Chapter 62 of the Act will be required to comply with the provisions of the Chapter, we nevertheless believe that codification of the notice requirements proposed in Rule R23-4 and the statement of public utility status in Rule R23-5 may serve to resolve potential procedural questions related to the implementation of the Act.

Thus, after carefully considering the language of H129, the Public Staff's Comments and Recommendations, the Public Staff's Reply Comments, the NCCTA's Comments on the Public Staff's Proposed Rule, the revisions proposed to the rules by the NCCTA, and the original and revised rule proposed by the Public Staff, the Commission concludes that the Rule that is attached hereto as Appendix A shall be adopted. In adopting this Rule, the Commission notes that the rule that we have today adopted is identical to the Revised Rule proposed by the Public Staff as an attachment to its December 9, 2011 Reply Comments.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the _28th day of February, 2012.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

Dl022812.01

APPENDIX A

Chapter 23
Provision of Communications Services by Cities

Rule R23-1 Application of this Rule

This Chapter exists to implement certain aspects of Session Law 2011-84, codified in large part in G.S. 160A-340, et seq., relating to this Commission's authority. This Chapter governs any city or joint agency that seeks to provide communications service in North Carolina, except as specifically exempted in S.L. 2011-84.

Rule R23-2 Definitions

(a) The term "city" shall be defined as provided in G.S. 160A-1(2).

(b) The following terms shall be defined as provided in G.S. 160A-340: "city-owned communications service provider"; "communications network"; "communications service"; "high-speed Internet access service"; "interlocal agreement"; and "joint agency".

(c) The terms "cable service", "telecommunications service", and "video programming service" have the same meanings as in G.S. 105-164.3.

(d) The term "unserved area" shall be defined as provided in G.S. 160A-340.2(b).

Rule R23-3 Petition for determination of an unserved area; objections to determination

(a) A city that proposes to provide communications service to an unserved area shall first file a petition with the Commission for a determination that the area is unserved.

(b) The petition shall comply with Commission Rule R1-5 and provide sufficient information to demonstrate to the Commission that the area in question meets the definition of "unserved area." In addition to the information required in Rule R1-5, the petition shall also include the following:

(1) A description of each census block proposed to be included in the unserved area.

(2) Information on the current availability of high-speed Internet access service at the household level in the proposed unserved area.

(3) A letter or resolution in support of the determination from the appropriate governing body that is filing the petition.

(c) The Commission or Public Staff may request additional information as needed.

(d) Procedure upon receipt of Petition – Upon the filing of a petition that meets the requirements set forth above:

(1) The Commission will issue a procedural order stating that a petition for a determination of an unserved area has been received and that parties who wish to file an objection to the petition must file the objection in writing and in compliance with the provisions of Rule R1-5 within 60 days of the date of the procedural order. The Commission shall also post the procedural order on its website.

(2) Upon its own initiative, the Commission may schedule a hearing to determine whether a determination should be made and require notice of the hearing to be published by the petitioner in the newspaper in the county or counties where the proposed unserved area is located.

(3) If an objection is filed within 60 days of the procedural order, the Commission will schedule a hearing to consider whether a determination should be made and will give reasonable notice to the petitioner and to each objecting party. Following the hearing, the Commission will enter an order making the determination whether an area is unserved.

(4) If no objection is filed within the time specified, the Commission shall enter an order making the determination whether an area is unserved.

(e) No city shall begin providing communications service in an unserved area prior to receiving a determination from the Commission that the area is unserved.

Rule R23-4 Notice of proposal to provide service

(a) Upon filing of a notice by a city or joint agency that proposes to provide communications services pursuant to G.S. 160A-340.3, the Commission shall post the notice of the proposal on the Commission's website. The notice must be filed with the Commission at least 45 days prior to first hearing scheduled in the notice and shall remain available on the Commission’s website through the duration of the public hearings scheduled in the notice.

(b) A city may file a petition for determination of an unserved area pursuant to Commission Rule R23-3 contemporaneously with the notice requirements of this rule.

APPENDIX A

Rule R23-5 Public utility status of city-owned communications service provider

Except as provided in Sections 5 and 6 of S.L. 2011-84, G.S. 160A-340.2, and G.S. 62-2(b1), a city or joint agency that provides service as defined in G.S. 62-3(23)a.6. is a public utility and shall comply with all applicable provisions of the Public Utilities Act and all applicable rules and regulations of the Commission.