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# LOCAL GOVERNMENT Local Government Cable Fair Competition: Require Public Cable Service Providers to Conduct Cost-Benefit Analysis and Hold a Public Hearing Prior to Entering the Cable Service Market; Provide for Cost Accounting and Allocation and Prohibit Cross-Subsidization; Impose Fairness Requirements on Public Providers Regarding Franchise Agreements, Conditions of Access to Public Property, and Price or Rate Charged for the Cable Services; Provide for Applicability of Open Meetings Laws; Subject Local Governments

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# Acting as Cable Service Providers to Antitrust Liability

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## LOCAL GOVERNMENT

*Local Government Cable Fair Competition: Require Public Cable Service Providers to Conduct Cost-Benefit Analysis and Hold a Public Hearing Prior to Entering the Cable Service Market; Provide for Cost Accounting and Allocation and Prohibit Cross-Subsidization; Impose Fairness Requirements on Public Providers Regarding Franchise Agreements, Conditions of Access to Public Property, and Price or Rate Charged for the Cable Services; Provide for Applicability of Open Meetings Laws; Subject Local Governments Acting as Cable Service Providers to Antitrust Liability*

CODE SECTIONS:	O.C.G.A. §§ 36-90-1 to -8 (new)
BILL NUMBER:	SB 240
ACT NUMBER:	454
GEORGIA LAWS:	1999 Ga. Laws 1267
SUMMARY:	The Act requires public providers of cable television services to conduct a three-year cost-benefit analysis and hold at least one public hearing before they can deliver cable service in an area. Public providers must prepare and maintain proper records of the full cost accounting of providing their service in the same manner required from a private provider. A public provider may use capital from its general funds to finance its service, provided it allocates these funds in the calculation of its capital cost; it may not cross-subsidize its cable operation by using other funds and resources available to it without proper cost allocation. A public provider must add the fees that it charges private providers into its total costs. A public provider, acting by itself or through a franchising authority under its control, shall not grant itself terms more favorable than those imposed on any private provider within the same jurisdiction, including local

regulations or transfer, modification or franchise renewal terms. A public provider shall offer its cable service at a price equal to or greater than the price of comparable competing private providers or equal to or greater than its total costs, unless state or federal law requires such service to be subsidized. All meetings and records of public cable service providers are subject to Georgia public records and public meetings laws. Public providers of cable services are not immune from antitrust liability.

EFFECTIVE DATE: July 1, 1999

### *History*

In the last several years, Georgia municipal governments have been aggressively entering into areas of business that have traditionally been the domain of the private sector.<sup>1</sup> Many cities are expanding their array of services, such as water, sewage, trash collection, gas, and electricity, to now also include cable television, telecommunications, hotels, real estate development, and construction.<sup>2</sup> Some commentators applaud this trend because they believe the public sector can ensure that Georgia citizens receive quality services in a cost-effective manner if the private sector is unable or unwilling to provide them.<sup>3</sup> In particular, government-provided cable television service ensures competition in many areas that would otherwise be served by only one private provider.<sup>4</sup> Critics characterize this trend as

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1. See Charles Haddad, *High-Speed Chase an Edge for Newnan*, ATLANTA J. & CONST., Mar. 3, 1999, at D1 (listing the cities of Covington, Doerun, Fairburn, Monroe, Newnan, and Quitman that provide some cable services; other cities are planning to offer them in the future); see also Steve Langford, *Why Georgia Needs to Balance the Public-Private Playing Field*, GA. PUB. POL'Y FOUND., Dec. 21, 1998.

2. See Langford, *supra* note 1; Duane D. Stanford, *The Utility Players Area Municipalities in Game of Providing Power, Gas Say Taxpayers are the Winners*, ATLANTA J. & CONST., July 6, 1995, at R1.

3. See Interview with Randy Clements, Georgia Municipal Association (May 3, 1999) [hereinafter Clements Interview].

4. See Interview with Clifford L. Adams, Jr., Georgia Municipal Association (May 24, 1999) [hereinafter Adams Interview]; see also Charles Haddad, *Can the Telecom Act Be Salvaged? State's Cable Market Heats Up*, ATLANTA J. & CONST., Feb. 7, 1999, at D4 (characterizing Georgia as unique in the level of competition in the cable TV market

an unwarranted governmental intrusion into the economy at the risk and expense of the taxpayer.<sup>5</sup> According to this view, government-provided services are inefficient and offer less service at a higher cost.<sup>6</sup> Allowing governmental participation in the cable television market would ultimately erode not only the private sector, which will have to bear the burden of competing against protected and subsidized governmental service providers, but also the tax base of the government itself; when tax-exempt governmental entities provide services that the private sector would otherwise provide, tax revenue will inevitably be lost.<sup>7</sup>

In the 1998 legislative session, Senator Steve Langford of the 29th District introduced the Free Enterprise Encouragement Act of 1998.<sup>8</sup> The purpose of the bill was to regulate the provision or sale of goods, property, and services by governmental entities that compete with private enterprises “in an attempt to check the unfairness of this trend and to save taxpayers [from unnecessary financial risks].”<sup>9</sup> The proposed bill subjected public providers to all statutory and regulatory requirements that would be applicable to private providers.<sup>10</sup> It prohibited public providers from charging prices or rates lower than their total costs, which must include all costs that would be borne by a private provider (including, for example, taxes and fees).<sup>11</sup> The bill evidently touched on a sensitive issue because Senator Langford received more tangible opposition to SB 343 than to any other law he had ever introduced in the past.<sup>12</sup> Subsequently, the Senate Rules Committee rejected the bill.<sup>13</sup>

SB 240, introduced in the 1999 session, was a much narrower legislation, representing a well-negotiated compromise between the

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compared to other states).

5. See Langford, *supra* note 1.

6. See *id.*

7. See *id.*; Jim Wooten, *With Fiber Optics, Some Cities See Future in Cable TV*, ATLANTA J. & CONST., Dec. 21, 1997 (citing a letter from a taxpayer concerned with the high risk of failure associated with cable TV project planned by Forsyth City Council).

8. See SB 343, as introduced, 1998 Ga. Gen. Assem.

9. Langford, *supra* note 1.

10. See SB 343, as introduced, 1998 Ga. Gen. Assem.

11. See *id.*

12. See Interview with former Senator Steve Langford, Senate District No. 29 (Apr. 14, 1999) [hereinafter Langford Interview].

13. See Langford, *supra* note 1.

interests of city governments and private enterprises who sought to guarantee a level playing field in the area of cable television services.<sup>14</sup>

### *Introduction*

Senators Eric B. Johnson of the 1st District, Don Cheeks of the 23rd District, and Nathan Dean of the 31st District introduced SB 240 during the 1999 session.<sup>15</sup> The cable television lobby in Washington, D.C. drafted most of the original bill.<sup>16</sup> The Georgia Municipal Association (GMA) initially opposed the bill; however, its lobbyists negotiated with lobbyists from private cable companies and together they drafted a version<sup>17</sup> that the General Assembly passed without alteration.<sup>18</sup>

Private providers were mainly concerned that cities could create an unfair market advantage for themselves by using their vast resources to cross-subsidize cable operations without accounting for their costs for the purpose of calculating prices or rates.<sup>19</sup> The cities insisted that they only sought to ensure quality cable services in their areas at competitive prices—not to generate revenue.<sup>20</sup> The two sides spent nearly half of the 1999 session finalizing the language of the bill before the sponsors introduced it.<sup>21</sup>

### *The Act*

The Act adds a new Code chapter named “The Local Government Cable Fair Competition Act of 1999.”<sup>22</sup>

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14. See Interview with Sen. Eric B. Johnson, Senate District No. 1 (May 2, 1999) [hereinafter Johnson Interview]; Adams Interview, *supra* note 4.

15. See SB 240, as introduced, 1999 Ga. Gen. Assem.

16. See Johnson Interview, *supra* note 14.

17. See *id.*

18. Compare SB 240, as introduced, 1999 Ga. Gen. Assem., with O.C.G.A. §§ 36-90-1 to -8 (Supp. 1999).

19. See Adams Interview, *supra* note 4; Johnson Interview, *supra* note 14.

20. See Adams Interview, *supra* note 4. *But see* Stanford, *supra* note 2 (quoting statistical data from one Georgia city in which some two-thirds of the city’s 1994 operating budget was subsidized by profits from selling electricity, gas, and cable television).

21. See Johnson Interview, *supra* note 14. Senator Johnson indicated that he refrained from introducing the bill before he was assured that the two sides had reached a compromise and the bill would not be defeated on the floor or in committee. See *id.*

22. See O.C.G.A. § 36-90-1 (Supp. 1999).

*Definitions*

The Act defines “cable service” as both a one-way transmission of video programming or other programming service and two-way transmissions that allow subscriber interaction for such programming.<sup>23</sup> It defines “capital costs” as “all costs of providing a service which are capitalized in accordance with generally accepted governmental accounting principles.”<sup>24</sup> The Act further defines “direct” and “indirect costs” as, respectively, expenses directly attributable to the provision of the service<sup>25</sup> and those applicable to two or more services or other public provider functions and not directly identifiable with a single service.<sup>26</sup> In addition, the Act defines “full-cost accounting” as an accounting of all costs of providing the service by a public provider, including direct and indirect costs, prepared under the standards of the federal Office of Management and Budget.<sup>27</sup> Finally, the Act gives a broad definition to “cross-subsidization,” defining it as “payment of any item of direct or indirect costs . . . which is not accounted for in the full cost [computation for] providing the service.”<sup>28</sup>

*Public Notice and Accounting Requirement*

Under the Act, a public provider shall prepare a cost-benefit analysis extending for a period of at least three years and must disclose all projected direct and indirect costs of and revenues from providing cable service.<sup>29</sup> Further, prior to authorizing the project, a public provider shall notify the public and conduct at least one public

23. *See id.* § 36-90-2(1). Although the original Langford bill addressed telecommunications and cable television services, the Act only deals with cable television services because the GMA and telecommunications lobbyists were unable to reach a compromise over certain issues. *See Johnson Interview, supra* note 14. In the future, if telecommunications and cable television services merge, new legislation may need to be introduced to address “hybrid” service providers, but such legislation is currently premature because it is still unclear what form the hybrid service would take. *See Clements Interview, supra* note 3.

24. O.C.G.A. § 36-90-2(2) (Supp. 1999). The Act further allows cities to use their general funds to provide cable TV services, provided that they account for their cost of capital at a reasonable rate of interest when calculating their total cost of doing business. *See id.* § 36-90-4; Adams Interview, *supra* note 4.

25. *See* O.C.G.A. § 36-90-2(4) (Supp. 1999).

26. *See id.* § 36-90-2(9).

27. *See id.* § 36-90-2(7).

28. *See id.* § 36-90-2(3).

29. *See id.* § 36-90-3(a).

hearing on the project.<sup>30</sup> These provisions give citizens notice of the extent of the government's economic involvement in providing cable services and of the financial risks to which it will expose itself by undertaking this project.<sup>31</sup>

In order to further the public's control over the economic decisions by governmental cable service providers, the Act requires public providers to prepare and maintain records according to generally accepted governmental accounting principles.<sup>32</sup> All meetings and records of public cable service providers are open to the public and are subject to Georgia public records and public meetings laws.<sup>33</sup>

### *Cost Accounting and Fairness of Competition Requirements*

#### *Cost Imputation*

The Act specifically requires public service providers to impute franchise fees, regulatory fees, occupation taxes, pole attachment fees, and ad valorem property taxes calculated in the same manner as they would be for private services providers into their indirect costs of doing business.<sup>34</sup> The Act does not list state and federal taxes among the types of expenses cities must impute into their cost of doing business.<sup>35</sup> The cities insisted on excluding these taxes from the imputation requirement because Georgia's Constitution exempts local governments from such taxes and because cities have no control over the amounts of these taxes charged to the private providers.<sup>36</sup> The cities argue that they should impute into their costs only those taxes and fees over which they have control and that they can levy on private providers.<sup>37</sup>

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30. *See id.* § 36-90-3(b).

31. *See* Johnson Interview, *supra* note 14. Senator Johnson indicated that high-tech industry generally should not be an area of government involvement because it is a new and rapidly changing field and the government does not function well in fast-changing areas. *See id.* However, when bringing cable services to rural areas, there may be a need for governmental interference, provided it is done with the knowledge and consent of the citizenry. *See id.*

32. *See* O.C.G.A. § 36-90-4 (Supp. 1999).

33. *See id.* § 36-90-6.

34. *See id.* § 36-90-4.

35. *See id.*

36. *See* Adams Interview, *supra* note 4. Telecommunications companies were particularly unhappy about this provision and it was one of the main reasons they decided not to continue in the negotiations of the bill. *See* Clements Interview, *supra* note 3.

37. *See* Adams Interview, *supra* note 4. While the cable companies agreed to this



*Cost Allocation*

The Act expressly prohibits cross-subsidization of the costs of providing service.<sup>38</sup> During the negotiations, the parties agreed on “cross-subsidization” to mean the practice where cities use their general capital funds or labor or equipment resources for the purpose of providing cable television services.<sup>39</sup> Under the Act, a city shall allocate its indirect or common expenses when using labor and equipment that it would normally use for other purposes in providing cable television service.<sup>40</sup> For example, a city may use its accounting department, which would otherwise bill for utilities and other services to collect revenue for cable television services.<sup>41</sup> Likewise, a city may use the same utility repair trucks and personnel to install or repair cable as long as the cities allocate an account for the associated labor and material costs when calculating their total costs of providing the cable service.<sup>42</sup> Capital costs from using general funds for financing cable operations should also be properly allocated and accounted for in the total cost computation.<sup>43</sup>

*Fair Administration*

The Act prohibits public providers from employing terms more favorable or less burdensome than those imposed on private providers in the same jurisdiction, including rights to access of public property and pole attachment.<sup>44</sup> It also prohibits public providers from unreasonably withholding a private provider’s request to transfer, modify, or renew its existing franchise if such a request complies with the terms of the franchise and with federal requirements.<sup>45</sup> Further, the Act requires franchising authorities to impose the same local regulations on public and private cable service providers.<sup>46</sup>

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compromise, the telecommunications companies involved in the negotiations declined to do so. *See* Clements Interview, *supra* note 3.

38. *See* O.C.G.A. § 36-90-4 (Supp. 1999).

39. *See* Clements Interview, *supra* note 3; Johnson Interview, *supra* note 14.

40. *See* O.C.G.A. § 36-90-4 (Supp. 1999); Clements Interview, *supra* note 3; Johnson Interview, *supra* note 14.

41. *See* Clements Interview, *supra* note 3; Johnson Interview, *supra* note 14.

42. *See* Clements Interview, *supra* note 3; Johnson Interview, *supra* note 14.

43. *See* O.C.G.A. § 36-90-4 (Supp. 1999).

44. *See id.* § 36-90-5(a).

45. *See id.* § 36-90-5(c).

46. *See id.* § 36-90-5(b).

*Pricing and Antitrust Provisions*

Finally, the Act requires public providers to offer their services at a rate greater than or equal to the rate offered by competing private providers for comparable services or at a rate greater than or equal to the public provider's incremental direct and indirect costs of doing business.<sup>47</sup> However, if such service is subsidized under state or federal law, the amount of the subsidy should be identified in the full accounting of such service.<sup>48</sup> Initially, the cities proposed a provision prohibiting cross-subsidization by either side.<sup>49</sup> Still, private providers wanted to preserve their ability to subsidize their operations.<sup>50</sup> Therefore, they agreed to allow cities to charge lower rates as long as those rates are above the cities' total costs; in return, private providers (but not public providers) may retain the ability to cross-subsidize.<sup>51</sup> Further, the Act subjects public entities to antitrust liability when acting in the role of cable services providers, subject, however, to the limitations of federal law.<sup>52</sup>

*Conclusion*

The Local Government Cable Fair Competition Act of 1999<sup>53</sup> is the result of long negotiations and a carefully crafted compromise between the cable television industry and Georgia municipalities.<sup>54</sup> The Act originated from a broader effort to introduce new rules addressing recent economic developments, specifically the trend of increased governmental involvement in private sector activities.<sup>55</sup> This development evoked private industry concerns about unfair competition, which the original SB 343 (of 1998) and the present Act were designed to address.<sup>56</sup>

The main purpose of the Act is to ensure fair pricing by local governments of their cable television services without unnecessarily constraining them in the use of available resources.<sup>57</sup> The Act calls for

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47. *See id.*

48. *See id.* § 36-90-6.

49. *See* Adams Interview, *supra* note 4.

50. *See id.*

51. *See id.*

52. *See* O.C.G.A. § 36-90-8 (Supp. 1999).

53. *See id.* §§ 36-90-1 to -8.

54. *See* Adams Interview, *supra* note 4.

55. *See* Clements Interview, *supra* note 3; Johnson Interview, *supra* note 14.

56. *See* Langford Interview, *supra* note 12; Johnson Interview, *supra* note 14.

57. *See* Clements Interview, *supra* note 3; Johnson Interview, *supra* note 14.

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allocation of capital costs, prohibits cross-subsidization by public providers (by requiring the allocation of common labor, material and capital costs), and requires cities to impute fees, taxes, and other charges they impose upon private companies.

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