

Fifty-sixth Legislative Assembly, State of North Dakota, begun in the Capitol in the City of Bismarck, on Tuesday, the fifth day of January, one thousand nine hundred and ninety-nine

HOUSE BILL NO. 1451
(Representative Grosz)
(Senators Nething, Tomac)

AN ACT to create and enact sections 49-21-23, 49-21-24, 49-21-25, 49-21-26, and 49-21-27 of the North Dakota Century Code, relating to right-of-way fees; to amend and reenact section 49-21-01 and subdivision g of subsection 3 of section 49-23-04 of the North Dakota Century Code, relating to telecommunications definitions and time periods under the one-call excavation notice system; and to provide for retroactive application.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 49-21-01 of the 1997 Supplement to the North Dakota Century Code is amended and reenacted as follows:

49-21-01. Definitions. As used in this chapter, unless the context otherwise clearly requires:

1. "Access" means telecommunications services to connect a telecommunications customer or end user with a telecommunications company that allows for the origination or the termination, or both, of WATS, 800, and message toll telecommunications services and private line transport services. "Switched access" includes:
 - a. Local exchange central office switching and signaling;
 - b. Operator and recording intercept of calls;
 - c. Termination of end user lines in the local exchange central office;
 - d. The carrier common line charge for the line between the end user's premises and the local exchange central office; and
 - e. Telecommunications service, including connections, provided to allow transmission service and termination between an interexchange company's premises and the local exchange central office switch for the origination or termination of the interexchange company's switched telecommunications services.
2. "Essential telecommunications price factor" means:
 - a. In the case of group I telecommunications companies, a factor determined annually as the lower of:
 - (1) 41.6667 percent of the percentage change of the average annual gross national product price index; or
 - (2) The percentage change of the average annual gross national product price index minus 2.75 percentage points.
 - b. In the case of group II telecommunications companies, a factor determined annually as the lower of:
 - (1) 52.0834 percent of the percentage change of the average annual gross national product price index; or
 - (2) The percentage change of the average annual gross national product price index minus 2.0625 percentage points.

- c. For purposes of the determination of essential telecommunications price factor, group I telecommunications companies are telecommunications companies with over fifty thousand subscribers and group II telecommunications companies are telecommunications companies with fifty thousand or fewer subscribers.
3. "Essential telecommunications service" means service that is necessary for switched access to interexchange telecommunications companies and necessary for two-way switched communications for both residential and business service within a local exchange area. A charge based on measured service may not be required for residential and business local exchange service. Essential telecommunications services are limited to:
- a. Switched access;
 - b. Any new product or service offered in North Dakota after July 1, 1989, deemed essential by the commission after notice and hearing in accordance with chapter 28-32;
 - c. Billing and collection of the billing company's own essential telecommunications services and billing and collection recording for interexchange carriers to which the local exchange carrier provides feature group C access service;
 - d. Primary directory listing, including nonlisted and nonpublished service, and local exchange directory assistance;
 - e. Emergency 911 services and emergency operator assistance in local exchange areas in which emergency 911 service is not available;
 - f. Except as provided in section 49-02-01.1, mandatory, flat-rate extended area service to designated nearby local exchange areas;
 - g. Installation of the service connection for essential services from the end user's premises to the local exchange network;
 - h. Transmission service necessary for the connection between the end user's premises and the local exchange central office switch including a trunk connection that has direct inward dialing and necessary signaling service such as touchtone used by end users for essential telecommunications services;
 - i. Single or multiparty flat-rate or measured residence and business service;
 - j. Single or multiparty flat-rate or measured combination business and residence service; and
 - k. The transmission service line for a coin or pay telephone.
4. "Gross national product price index" means the fixed-weighted price index of prices of all the goods and services that make up gross national product, as published quarterly by the United States department of commerce, economics and statistics administration, bureau of economic analysis. "Average annual gross national product price index" means the mean of the gross national product price index published in the third calendar quarter of a year through the second calendar quarter of the following year.
5. "Interexchange telecommunications company" means a person providing telecommunications service to end users located in separate local exchange areas.
6. "Local exchange area" means a geographic territorial unit established by a telecommunications company for the administration of telecommunications services as approved and regulated in accordance with chapter 49-03.1.
7. "Management costs" means the reasonable direct actual costs a political subdivision incurs in exercising its police powers over the public rights of way.

- ~~8.~~ 9. "Mutual telephone company" means a telephone cooperative organized and operating subject to the provisions of this chapter, and such a cooperative shall also be subject to the general law governing cooperatives, except where such general law is in conflict with this chapter.
- ~~8.~~ 9. "Nonessential telecommunications service" means any telecommunications service, other than those essential telecommunications services listed in subsection 3 that a customer has the option to purchase either in conjunction with or separate from any essential telecommunications service. Nonessential telecommunications services include, but are not limited to:
- a. InterLATA and intraLATA message toll service;
 - b. Private line transport service;
 - c. Calling features and information or enhanced services such as call waiting, call forwarding, three-way calling, intracall, speed calling, call transfer, voice or data store and forward, message delivery, or caller identification;
 - d. Centrex services and features, not including transmission service described in subdivision h of subsection 3 of this section;
 - e. Installation of service connections in addition or supplementary to that described in subdivision g of subsection 3 which also provides transmission service between the end user's premises and the local exchange central office switch;
 - f. Mobile telecommunications services using radio spectrum or cellular technology; and
 - g. Packet-switched services.
- ~~9.~~ 10. "Price" means any charge set and published in accordance with chapter 49-21 and collected by a telecommunications company for any telecommunications service offered by it to the public or other telecommunications companies.
- ~~40.~~ 11. "Private line transport service" means a telecommunications service to a customer over a circuit dedicated to the customer's exclusive use, within a local exchange area, or between or among local exchanges. Private line transport service includes services to customers who are end users and services to telecommunications companies.
12. "Public right of way" means the area on, below, or above a public roadway, highway, street, bridge, cartway, bicycle lane, or public sidewalk in which a political subdivision has a legal interest, including other dedicated rights of way for travel purposes, utility easements, and all the area within seventy-five feet [22.86 meters] of the centerline of any county or township highway right of way over which a board of county commissioners or a board of township supervisors has control under section 24-01-42. The term does not include the airwaves above a public right of way with regard to cellular or other wireless telecommunications or broadcast service or utility poles owned by a political subdivision or a municipal utility or a telecommunications company, in whole or part.
- ~~44.~~ 13. "Service element" means a telecommunications function or service component that is not useful to the user unless it is combined with one or more other telecommunications functions or service components.
- ~~42.~~ 14. "Telecommunications company" means a person engaged in the furnishing of telecommunications service within this state.
- ~~43.~~ 15. "Telecommunications service" means the offering for hire of telecommunications facilities, or transmitting for hire telecommunications by means of such facilities whether by wire, radio, lightwave, or other means.

SECTION 2. Section 49-21-23 of the North Dakota Century Code is created and enacted as follows:

49-21-23. Fees. Unless the governing body of a political subdivision has submitted to the qualified electors of that political subdivision the question of whether to impose a fee other than a fee for management costs and a majority of the voters approved the fee, a political subdivision may not impose after December 31, 1998, any fee to recover from a telecommunications company for the use of its right of way, other than a fee for its management costs. If requested by a political subdivision, in order to accomplish a necessary public improvement on the right of way, a telecommunications company promptly shall remove its facilities from the public right of way or shall relocate or adjust its facilities within the public right of way at no cost to the political subdivision. Necessary public improvements are limited to construction and maintenance activities directly related to improved transportation and safety. A political subdivision may recover from a telecommunications company only those management costs caused by the telecommunications company activity in the public right of way. A fee or other obligation under this section must be imposed on a competitively neutral basis. When a political subdivision's management costs cannot be attributed to only one entity, those costs must be allocated among all users of the public rights of way, including the political subdivision itself. The allocation must reflect proportionately the costs incurred by the political subdivision as a result of the various types of uses of the public right of way. This section does not prohibit the collection of a franchise fee as permitted in section 49-21-26.

SECTION 3. Section 49-21-24 of the North Dakota Century Code is created and enacted as follows:

49-21-24. In-kind services. A political subdivision, in lieu of a fee imposed under section 49-21-23, may not require in-kind services by a telecommunications company right-of-way user or require in-kind services as a condition of the use of the political subdivision's public right of way.

SECTION 4. Section 49-21-25 of the North Dakota Century Code is created and enacted as follows:

49-21-25. Arbitration.

1. A telecommunications company that is denied the use of or access to a political subdivision right of way, that has its right-of-way permit revoked, or that believes that the fees imposed on that company by the political subdivision do not conform to the requirements of section 49-21-23 may request in writing that the denial, revocation, or fee imposition be reviewed by the governing body of the political subdivision. The governing body of the political subdivision shall act within thirty days of the request. A decision by the governing body affirming the denial, revocation, or fee imposition must be in writing and supported by written findings establishing the reasonableness of the decision.
2. Upon affirmation by the governing body of the denial, revocation, or fee imposition, the telecommunications company may do either of the following:
 - a. With the consent of the governing body, submit the matter to final, binding arbitration. Binding arbitration must be before an arbitrator selected by the political subdivision and the telecommunications company. If the parties are unable to agree on an arbitrator, the matter must be resolved by the three-person arbitration panel made up of one arbitrator selected by the political subdivision, one arbitrator selected by the telecommunications company, and one arbitrator selected by the other two arbitrators. The cost of a single arbitrator must be paid equally by the political subdivision and the telecommunications company. If a three-person arbitration panel is selected, each party shall pay the cost of its own arbitrator, and the parties shall jointly pay the cost of the third arbitrator and of the arbitration. Each party to the arbitration shall pay its own costs, disbursements, and attorney fees.
 - b. Bring an action in district court to review a decision of the governing body made under this section.

SECTION 5. Section 49-21-26 of the North Dakota Century Code is created and enacted as follows:

49-21-26. Franchise ordinance not superseded. Sections 49-21-23, 49-21-24, and 49-21-25 do not modify or supersede the rights and obligations of a political subdivision and the telecommunications company established by the terms of any existing franchise. A city that collects a city franchise fee under a franchise may not collect a fee from that entity under section 49-21-23. A political subdivision that collects a fee prohibited by section 49-21-23 on January 1, 1999, may continue to collect that fee.

SECTION 6. Section 49-21-27 of the North Dakota Century Code is created and enacted as follows:

49-21-27. Cost recovery. A telecommunications company that is assessed either management costs by a political subdivision pursuant to section 49-21-23 or a city franchise fee pursuant to section 49-21-26 is entitled to recover those costs. If the telecommunications company serves customers within the boundaries of the political subdivision imposing the management costs, the costs may be recovered only from those customers.

SECTION 7. AMENDMENT. Subdivision g of subsection 3 of section 49-23-04 of the 1997 Supplement to the North Dakota Century Code is amended and reenacted as follows:

- g. An excavator may not use a location more than ~~seventy-two hours~~ ten days, or any extension of that period, after the planned excavation date unless the excavator has made previous arrangements with the operators affected.

SECTION 8. RETROACTIVE APPLICATION. Sections 1 through 6 of this Act apply retroactively to January 1, 1999.

Speaker of the House

President of the Senate

Chief Clerk of the House

Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Fifty-sixth Legislative Assembly of North Dakota and is known on the records of that body as House Bill No. 1451.

House Vote: Yeas 54 Nays 42 Absent 2

Senate Vote: Yeas 31 Nays 17 Absent 1

Chief Clerk of the House

Received by the Governor at _____ M. on _____, 1999.

Approved at _____ M. on _____, 1999.

Governor

Filed in this office this _____ day of _____, 1999,
at _____ o'clock _____ M.

Secretary of State