

**§ 159-154. Nongovernmental control of public enterprises.**

(a) For purposes of this section, the following definitions apply:

- (1) Adjusted revenues. – Gross revenue of a public enterprise minus the cost of commodity purchases and wholesale electricity purchases for the public enterprise.
- (2) Consolidated nongovernmental entity. – Collectively, all affiliated nongovernmental entities, which includes each entity's parents, subsidiaries, and each other entity that owns, directly or indirectly, at least ten percent (10%) of the capital or voting rights of the entity, and each other entity in which the entity owns, directly or indirectly, at least ten percent (10%) of the capital or voting rights.
- (3) Control. – Any one or more of the following, except that a contractual arrangement by a unit of local government with a nongovernmental entity to provide specified maintenance services for a fixed fee or fee per service basis alone does not create control of the public enterprise for purposes of this section:
  - a. The authority to expend or otherwise manage during any fiscal year more than fifty percent (50%) of a public enterprise's adjusted revenues.
  - b. Responsibility for provision to the public of the services previously provided by the public enterprise.
  - c. Responsibility for operation and maintenance of a material portion of the assets and facilities of the public enterprise.
  - d. The authority to manage a material portion of the staff responsible for operation and maintenance of the assets and facilities of the public enterprise.
- (4) Nongovernmental entity. – Any person or entity other than (i) the State, (ii) a unit of local government, or (iii) a public body created pursuant to Chapter 159B of the General Statutes.
- (5) Public enterprise. – All or a material portion of one or more of the systems set forth in G.S. 160A-311, G.S. 153A-274, and Chapter 162A of the General Statutes.
- (6) Unit of local government. – A "unit of local government" as defined in G.S. 159-7 and a "public authority" as defined in G.S. 159-7.

(b) No unit of local government may concede or transfer control of any public enterprise that the unit of local government owns or operates to any nongovernmental entity or consolidated nongovernmental entity or enter into an agreement to do so unless the concession or transfer of control and the agreement thereunder have been approved by the Commission pursuant to this section as evidenced by the secretary's certificate thereon. Any agreement subject to Commission approval under this section that does not bear the secretary's certificate thereon shall be void, and it shall be unlawful for any officer, employee, or agent of a unit of local government to take any actions thereunder.

(c) Before executing an agreement subject to this section, the governing board of the unit of local government shall file an application for Commission approval of the agreement with the secretary of the Commission. The application shall state such facts and have attached to it such documents concerning the proposed agreement and the arrangements proposed to be carried out thereunder as the secretary may require. The Commission may prescribe the form of the application. Before the secretary accepts the application, the secretary may require the governing board or its representatives to attend a preliminary conference at which time the secretary and

deputies may informally discuss the proposed agreement and arrangements proposed to be carried out thereunder.

(d) Prior to the Commission's consideration of whether to approve an agreement subject to this section and the arrangements thereunder, the governing body of the unit of local government shall conduct a public hearing on whether the proposed arrangement is in the public interest and following the public hearing the governing body shall adopt a resolution or take a similar action stating that it determines that the proposed arrangement is in the public interest. The public hearing shall be held by the governing body of the unit of local government proposing the arrangement following publication of notice of the public hearing at least 10 days prior to the public hearing. The notice of public hearing shall describe the proposed arrangement in general terms. In determining that the arrangement is in the public interest, the governing body of the unit of local government shall consider, at a minimum, all of the following:

- (1) The physical condition of the public enterprise.
- (2) The capital replacements, additions, expansions, and repairs needed for the public enterprise to provide reliable service and meet all applicable federal standards.
- (3) The availability of federal and State grants and loans for system upgrades and repairs of the public enterprise.
- (4) The willingness and the ability of the nongovernmental entity to make system upgrades and repairs and provide high-quality and cost-effective service.
- (5) The reasonableness of the amount to be paid to the unit of local government to enter into the arrangement.
- (6) The reasonableness of any amounts to be paid by the unit of local government to exit the arrangement.
- (7) The service quality guarantees provided by the arrangement and the consequences of any failure to satisfy the guarantees.
- (8) The most recent income and expense statement and asset and liabilities balance sheet of the nongovernmental entity and any consolidated nongovernmental entity.
- (9) The projected rates to customers of the public enterprise during the term of the arrangement and the affordability of the services of the public enterprise resulting from such projected rates.
- (10) The experience of the nongovernmental entity and its affiliates within the consolidated nongovernmental entity in the operation of utility systems similar to the public enterprise that is the subject of the arrangement.
- (11) The alternatives to entering into the arrangement and the potential impact on utility customers if the arrangement is not entered.

(e) The Commission may approve an agreement for a unit of local government to concede or transfer control of a public enterprise and the arrangement to do so if it finds and determines that the customers of the public enterprise will enjoy reasonable and material short-term and long-term savings and other net benefits from the arrangement during the term of the arrangement without the imposition of any material cost or charge on the unit of local government or its customers upon termination of the arrangement. In determining whether a proposed agreement and the arrangements thereunder shall be approved, the Commission shall have authority to inquire into and to give consideration to such matters that it may believe to have bearing on whether the proposed agreement and the arrangement thereunder should be approved. Such matters may include any of the following:

- (1) The projected financial feasibility of the proposed arrangement in the short-term and long-term, its effect on rates to be charged to the customers of the public enterprise under the arrangements being proposed, and its effect on

the quality of services to be provided by the public enterprise under the arrangement.

- (2) The projected rates to customers of the public enterprise during the term of the arrangement, the basis for the establishment of such rates and the reasonableness of the basis, and the affordability of the services of the public enterprise resulting from such projected rates.
- (3) If the unit of local government will receive an initial payment for participating in the arrangement, a summary of the unit of local government's proposed plans for the use of the initial payment.
- (4) If there is any indebtedness of the unit of local government associated with the public enterprise, the plans for the retirement or defeasance of such indebtedness.
- (5) The financial condition of the nongovernmental entity and its affiliates within the consolidated nongovernmental entity and its ability to carry out the undertakings required of the nongovernmental entity in the arrangement.
- (6) The experience of the nongovernmental entity and its affiliates within the consolidated non-governmental entity in the operation of utility systems similar to the public enterprise that is the subject of the arrangement.
- (7) The nongovernmental entity's plans to finance its initial participation in the arrangement and future improvements to the public enterprise and the expected participation of the unit of local government in any financing.
- (8) The obligations of the nongovernmental entity set forth in the agreement for the maintenance of the public enterprise and the installation of improvements to the public enterprise during the term of the arrangement and the requirements of the agreement that adequate reserves be maintained during the term of the arrangement for such maintenance and improvements.
- (9) The plans set forth in the agreements for the arrangement for maintaining the quality of the components of the public enterprise to be returned to the control of the unit of local government at the end of the term of the agreement.
- (10) Any ongoing financial and other commitments of the unit of local government under the arrangement during its term.
- (11) Any financial payments the unit of local government is expected to be required to pay to the nongovernmental entity or any other person or entity at the end of the arrangement.
- (12) The effect, if any, of the arrangement on the tax status of interest on debt obligations issued by the unit of local government, or any other units of local government on account of contractual arrangements the other unit of local government may have with the unit of local government proposing the agreement being considered.

(f) The Commission may require that any projection or other analysis provided to the Commission in connection with its consideration of the arrangement be prepared by a qualified independent expert approved by the Commission.

(g) If the Commission tentatively decides to deny the application because it cannot be supported from the information presented to it, it shall so notify the unit of local government filing the application. If the Commission approves or denies the application, the Commission shall enter its order setting forth such approval or denial of the application. If the Commission enters an order denying the application, the proceedings under this section shall be concluded. An order approving an application shall not be construed as an approval of the legality of the agreement in any respect.

(h) If the Commission approves an agreement and the arrangements thereunder as provided in this section and thereafter the parties determine to terminate the agreement voluntarily prior to the expiration of its stated term, the unit of local government shall not enter into any such termination arrangement unless the termination is approved by the Commission following a procedure similar to the procedure for initial approval of the agreement and arrangement required by this section. This section shall not prohibit the termination of an agreement in the exercise of legal remedies following a breach of the agreement in accordance with its terms.

(i) If the Commission approves an agreement and the arrangements thereunder as provided in this section and thereafter the parties determine to amend the agreement in a material respect, the unit of local government shall not enter into any such amendment unless the amendment is approved by the Commission following a procedure similar to the procedure for initial approval of the agreement.

(j) Nothing in this section shall be construed to apply to the sale of a public enterprise to a utility regulated by the North Carolina Utilities Commission. (2023-138, s. 5(a).)