

I Establishing a Utility Account

1. May a local government require a potential customer to provide government-issued identification as a condition of establishing an account for public enterprise utility services?

Yes. A city or county has broad authority to “adopt adequate and reasonable rules to protect and regulate a public enterprise belonging to or operated by it.” The rules must be adopted by ordinance and applied uniformly to all customers. G.S. 160A-312(b); G.S. 153A-275(b). This authority likely extends to requiring potential customers to provide government-issued identification and other identifying information such as proof of address. A local government, however, must be careful not to engage in unlawful discrimination. To this end, it should allow multiple forms of government-issued identification (such as drivers’ licenses, state identification cards, military identifications, and passports) or proof of address (such as utility bills, cable television bills, telephone bills, deeds, and rental agreements).

Note: If a local government collects certain identifying information, it must make sure that the information is kept private. A local government is prohibited from intentionally communicating or otherwise making available to the general public certain identifying information, including Social Security or employer taxpayer identification numbers; driver’s license, state identification card, or passport numbers; checking or savings account numbers; credit or debit card numbers; digital signatures; personal identification code (PIN) numbers; biometric data (such as eye scans, voice scans, and DNA); fingerprints; or passwords.¹ G.S. 132-1.10(b)(5).

1. There are several exceptions to the requirement that the identifying information be kept confidential. The requirement does not apply if the identifying information is sufficiently redacted. G.S. 132-1.10(c)(4). Furthermore, a local government may disclose Social Security numbers or other identifying information to another governmental entity or its agents, employees, or contractors if disclosure is necessary for the receiving entity to

2. May a local government require a potential customer to provide a Social Security number as a condition of establishing an account for public enterprise utility services?

No. A local government is permitted to request that a potential customer provide a Social Security number but, under parallel provisions of the Federal Privacy Act, 5 U.S.C. § 552a (note),² and the State Privacy Act, G.S. 143-64.60, it cannot deny public enterprise utility services because the potential customer refuses to divulge his or her Social Security number. Furthermore, a local government must inform a potential customer in writing that disclosure of the Social Security number is voluntary and must state the legal authority under which the number is solicited and what uses will be made of the

perform its duties and responsibilities. G.S. 132-1.10(c)(1). (If a local government wishes to so disclose a Social Security number, it must inform the customer of the potential disclosure when the Social Security number is collected. 5 U.S.C. § 552a (note) (2007); G.S. 143-64.60.) The receiving party must maintain the confidential status of the information. A local government also may disclose the information if required by a court order, warrant, or subpoena, G.S. 132-1.10(c)(2), or to serve public health purposes in compliance with G.S. 130A. G.S. 132-1.10(c)(3). It may disclose any recorded document in the official records of the register of deeds of the county, G.S. 132-1.10(c)(6), and any document filed in the official records of the courts, G.S. 132-1.10(c)(7).

2. Section 7 of The Privacy Act of 1974, Pub. L. No. 93-579, 5 U.S.C. § 552a (note) (2007), provides that

(a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) The provisions of paragraph (1) of this subsection shall not apply with respect to—

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

See also *Yaeger v. Hackensack Water Co.*, 615 F. Supp. 1087 (D.N.J. 1985) (holding that water company, functioning as state actor, could not obtain a customer's Social Security number except in compliance with the Privacy Act).

number. 5 U.S.C. § 552a (note); G.S. 143-64.60(b); *see also* G.S. 132-1.10(b). A local government must provide enough information about the potential consequences of divulging the Social Security number to allow an individual to make a reasoned choice as to disclosure.³ The local government is prohibited from using the number for any purpose other than the purposes clearly stated when the number is solicited. G.S. 132-1.10(b)(4).

Note: If the local government collects a Social Security number, there are a number of limitations on its retention and dissemination. See 5 U.S.C. § 552a (note) (2007); G.S. 143-64.60; G.S. 132-1.10(b) and (c). For example, a local government is prohibited from printing an individual's Social Security number on any materials that are mailed to the individual, even if the materials are contained within a sealed envelope. G.S. 132-1.10(b)(9).

3. May a local government require a potential customer to pay a deposit or security fee before providing public enterprise utility services?

Yes. A local government has broad authority to establish “rents, rates, fees, charges, and penalties for the use of or the services furnished by a public enterprise.” G.S. 153A-277; G.S. 160A-314. This rate-making authority likely extends to establishing a deposit or security fee requirement for the use of public enterprise utility services.⁴

The deposit or security fee must be reasonable and nondiscriminatory. There is no specific definition of what constitutes a reasonable fee, but generally the deposit or security fee should approximate the risk of loss to the local government in the event of default. For example, it likely is reasonable for a local government to require a deposit or security fee in the amount of the average of one or two months of utility charges per customer for the class of customer requesting service. The deposit or security fee also could be based on the average amount of delinquent funds per customer in the event of default.

3. *See* Am. Fed'n of State, County, and Mun. Employees, Council 75 v. City of Albany 725 P.2d 381 (Or. App. 1986).

4. Other entities likely also are authorized to assess deposit or security fees. *See* G.S. 162A-88 (water and sewer districts); G.S. 162A-49 (metropolitan water districts); G.S. 162A-72 (metropolitan sewer districts). In fact, water and sewer authorities have specific authority to impose deposit fees. G.S. 162A-9.

4. May a local government assess different public enterprise utility service deposit or security fees for different customers?

Yes. A local government may establish a different schedule of deposit or security fees for different classes of customers, or charge the fees to some customers and not to others, as long as the deposit or security fee requirements are reasonable, nondiscriminatory, and consistently enforced.⁵ A local government also may charge deposit or security fees, or higher deposit or security fees, to non-resident customers than it charges to resident customers.⁶ G.S. 153A-277(a); G.S. 160A-314(a).

With respect to resident customers, a local government should have a rational basis for charging different deposit or security fees to different classes of customers. For example, a local government can charge a higher deposit fee to commercial or industrial customers than to residential customers. It also may charge a higher fee to customers who do not own the property or premises being served or to customers who have a history of delinquent enterprise bill payments or bad credit.⁷ Deposit or security fee classifications, however, cannot vary according to ability to pay, disability, or senior citizen status.⁸ And, of course, the classifications cannot be based on prohibited grounds such as race, color, alienage, religion, national origin, or gender.

5. Counties and cities have explicit authority to charge different fees for different classes of customers. G.S. 153A-277(a); G.S. 160A-314. Local units may classify customers based on differences in the costs of providing the utility service, as well as differences in “the purpose for which the service or the product is received, the quantity or the amount received, the different character of the service furnished, the time of its use or any other matter which presents a substantial ground of distinction.” *Wall v. City of Durham*, 41 N.C. App. 649, 659, 255 S.E.2d 739, 745 (1979). Other entities providing utility services, such as water and sewer districts, metropolitan districts, and authorities, likely also can establish different classes of customers pursuant to common law authority.

6. See Kara A. Millonzi, *Lawful Discrimination in Utility Ratemaking; Part 2: Classifying Extraterritorial Customers*, LOCAL FINANCE BULLETIN 34 (Oct. 2006). By local act, the City of Asheville is required to charge the same rate to nonresident customers who reside in Buncombe County as it charges its resident customers. See S.L. 2005-140; *City of Asheville v. State*, 2008 WL 3834026 (N.C. App. Aug. 19, 2008).

7. See, e.g., *Washington Gas Light Co. v. Pub. Serv. Comm’n of the District of Columbia*, 334 F. Supp. 1062 (D.D.C. 1972).

8. See Kara A. Millonzi, *Lawful Discrimination in Utility Ratemaking; Part 1: Classifying Customers within Territorial Boundaries*, LOCAL FINANCE BULLETIN 33, at 6 (Oct. 2006).

5. May a local government require a deposit or security fee, or a larger deposit or security fee, if a potential public enterprise utility services customer refuses to provide government-issued identification?

Yes. A local government may charge a deposit or security fee, or a larger deposit or security fee, to a customer who refuses to provide proof of identity or proof of address. Any deposit or security fee requirement must be reasonable and nondiscriminatory.⁹

6. May a local government require a deposit or security fee, or a higher deposit or security fee, if a potential public enterprise utility services customer refuses to provide a Social Security number?

Likely yes. Under parallel provisions of the Federal Privacy Act, 5 U.S.C. § 552a (note) (2007), and the State Privacy Act, G.S. 143-64.60, a local government may not deny utility services because a potential customer refuses to divulge his or her Social Security number. A local government, however, probably may charge a deposit or security fee, or a higher deposit or security fee, to a customer who refuses to provide a Social Security number, because making access to utility services more costly to a customer who refuses to provide a Social Security number does not deny the customer access to the utility services per se. If the fee is set too high, though, such a policy might be open to a claim by an individual that he or she effectively is denied services because of inability to pay the deposit or security fee. There currently is no case law addressing this issue.

7. Is a local government required to pay interest to a customer on funds held as a deposit or security fee for public enterprise utility services?

No. There is no legal requirement that a local government pay interest on funds held as a utility deposit.¹⁰ As a matter of practice, a local government may wish to inform a customer at the time the deposit or security fee is tendered that it is non-interest bearing.

9. See Questions 3 and 4.

10. See Stephen Holt, *Who is Entitled to Interest Earned by Local Governments?*, LOCAL FINANCE BULLETIN 26 (Nov. 1982).

8. Is a local government required to segregate moneys held as a deposit or security fee for public enterprise utility services?

No. All moneys held by a local government are subject to the provisions of the Local Government Budget and Fiscal Control Act (LGBFCA) (G.S. 159-1 through G.S. 159-42). The LGBFCA requires that all moneys received by a local government be deposited in an official depository.¹¹ G.S. 159-32. It does not prescribe that moneys received for separate purposes be segregated into different bank accounts.

For accounting and financial reporting purposes, though, a local government should show moneys held as deposits or security fees as a liability in the enterprise fund or general fund, depending on how the other public enterprise utility expenditures and revenues are reported.

9. May a local government refuse to reconnect a public enterprise utility service or establish a new account for service because the individual or entity seeking service is delinquent on payments for service provided at the same property or premises?

Yes. If a public enterprise utility service is discontinued because of a delinquent account, a local government may refuse to reconnect the service or establish a new account with the same customer at the same property or premises until the delinquent amounts, including all penalties, are paid in full.¹²

10. May a local government refuse to reconnect a public enterprise utility service or establish a new account for service because the individual or entity seeking service is delinquent on payments for service provided at a different property or premises?

Maybe. Although there is no North Carolina case law on point, several courts that have addressed this issue hold that a utility does not have common law authority to cut off or refuse service to a customer at one property or premises for failure to pay for utility service furnished at a different location under a

11. County water and sewer districts, metropolitan water and sewer districts, sanitary districts, and water and sewer authorities also are subject to the LGBFCA.

12. See Questions 10 and 62.

separate contract.¹³ The reasoning is that a utility is obligated to collect moneys owed in the usual way in which debts are collectible and cannot force payment by refusing service under a new contract.

Not all cases are in accord. A few courts have sustained the right of a utility to discontinue or refuse service because of nonpayment of fees for service at a different property or premises, without regard to any statutory, regulatory, or contract provisions.¹⁴ Other courts have upheld refusal of service at an address

13. *See, e.g.,* *Merrill v. Livermore Falls Light & Power Co.*, 105 A. 120 (Me. 1918) (holding that a utility cannot refuse to supply a consumer merely because he or she refuses to pay an overdue bill for service at some location other than that for which he or she is demanding a supply); *Miller v. Roswell Gas & Elec. Co.*, 166 P. 1177 (N.M. 1917) (“The authorities are uniform to the effect that a refusal to furnish water or light cannot be sustained merely because the consumer declines and refused to pay for past-due service for some other and independent use, or at some other place or residence.”); *Hatch v. Consumers’ Co.*, 104 Pac. 670 (Idaho 1909), *aff’d on other grounds*, 224 U.S. 148 (“A water company cannot enforce a rule requiring a consumer to pay an old or disputed bill for water furnished him at some previous time, or some other and independent use, or at some other place or residence, or for a separate or distinct transaction from that for which he is claiming and demanding a water supply, as a condition precedent to supplying him with water, where he tenders payment of the established water rate in advance for the service he is demanding.”); *cf. Komisarek v. New England Tel. & Tel. Co.*, 282 A.2d 671 (N.H. 1971) (holding that if a utility company intended to assert the right to terminate any service other than that for which the delinquent payment was due, “it was incumbent upon it to make this plain to its consumers by its tariff”); *Benson v. Paris Mountain Water Co.*, 70 S.E. 897 (S.C. 1910) (holding that a water company had no right to cut off the water from a consumer at one place to which it was supplied under contract for refusal of such consumer to pay a bill for water furnished him at another time and place, under another contract); *Elwell v. Atlanta Gas Light Co.*, 181 S.E. 599 (Ga. Ct. App. 1935) (observing that although a utility company has the right to require a reasonable deposit as security for the payment of service to be rendered, it may not refuse service to a consumer merely because he or she declines or refuses to pay a bill for past service rendered at some other place); *Gas-Light Co. of Baltimore v. Colliday*, 1866 WL 2012 (Md. Ct. App. May 10, 1866) (“[W]here several contracts are made between the same parties for different pieces of property, each requiring its own meter, as in this case, a failure to comply with any terms in relation to one, furnished no excuse or ground to the company to withhold the gas from the other.”).

14. *See Mackin v. Portland Gas Co.*, 61 P. 134 (Ore. 1900) (holding that the gas company’s rule that, in the event of a default, the company could continue the supply of gas until payment is made authorized the gas company to discontinue service to a customer “at one set of premises until payment should be made of [the] delinquent bill for gas furnished him at another” premises).

other than that at which the overdue charges were incurred where the contract employed by the particular utility in its transactions with customers specifically stated that it could deny service for the nonpayment of charges arising “under this contract or any other contract.”¹⁵

It is unclear how North Carolina courts would rule on this issue. If a local government wishes to refuse to provide a public enterprise utility service at a new property or premises because of a delinquency at a previous property or premises, it should, at a minimum, adopt an ordinance stating that it will furnish utility services only to a customer who is not currently delinquent on public enterprise utility services payments owed to the unit.¹⁶ A local government also should consider including language in its contractual agreements with customers warning that future public enterprise utility services may be denied to the customer at any property or premises on account of an outstanding delinquency. It is strongly recommended that a local government consult with its local counsel before adopting such a policy.

Note that instead of denying new service to the customer, the local government may charge a deposit or security fee, or a higher deposit or security fee, because of the outstanding delinquency.¹⁷

15. *DePass v. Broad River Power Co.*, 176 S.E. 325 (S.C. 1934); *see also Clark v. Utica Gas & Electric Co.*, 224 A.D. 448 (N.Y. App. Div. 1928) (holding that statutory provision providing that any person who should “neglect or refuse to pay the rent or remuneration due for the same” justified an electric company’s termination of service to a customer’s current residence because of his refusal to pay an overdue bill for electricity supplied at his previous residence). *But see Meridian L. & R. Co. v. Steele*, 83 So. 414 (Miss. 1919) (holding that a provision in a contract specifying that a utility could discontinue service for the nonpayment of charges incurred “upon such premises or elsewhere” was without consideration insofar as it gave the utility the right to refuse service at the location covered thereby until the customer paid an overdue bill for service rendered at an earlier address).

16. Cities and counties have authority to “protect and regulate any public enterprise system belonging to or operated by [the unit] by adequate and reasonable rules. The rules shall be adopted by ordinance, shall apply to the public enterprise systems both within and outside the [unit’s territorial boundaries], and may be enforced with the remedies available under any provision of law.” G.S. 160A-312(b); G.S. 153A-275(b).

17. See Question 4.