

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

H

2

HOUSE BILL 129*
Committee Substitute Favorable 3/23/11

Short Title: Level Playing Field/Local Gov't Competition.

(Public)

Sponsors:

Referred to:

February 21, 2011

1 A BILL TO BE ENTITLED
2 AN ACT TO PROTECT JOBS AND INVESTMENT BY REGULATING LOCAL
3 GOVERNMENT COMPETITION WITH PRIVATE BUSINESS.

4 Whereas, certain cities in the State have chosen to compete with private providers of
5 communications services; and

6 Whereas, these cities have been permitted to enter into competition with private
7 providers as a result of a decision of the North Carolina Court of Appeals rather than legislation
8 enacted by the General Assembly; and

9 Whereas, the communications industry is an industry of economic growth and job
10 creation; and

11 Whereas, as expressed in G.S. 66-58, known as the Umstead Act, it is against the
12 public policy of this State for any unit, department, or agency of the State, or any division or
13 subdivision of a unit, department, or agency of the State to engage directly or indirectly in the
14 sale of goods, wares, or merchandise in competition with citizens of the State; and

15 Whereas, to protect jobs and to promote investment, it is necessary to ensure that the
16 State does not indirectly subsidize competition with private industry through actions by cities
17 and to ensure that where there is competition between the private sector and the State, directly
18 or through its subdivisions, it exists under a framework that does not discourage private
19 investment and job creation; Now, therefore,

20 The General Assembly of North Carolina enacts:

21 **SECTION 1.(a)** Chapter 160A of the General Statutes is amended by adding a new
22 Article to read as follows:

23 "Article 16A.

24 "Provision of Communications Service by Cities.

25 **"§ 160A-340. Definitions.**

26 The following definitions apply in this Article:

- 27 (1) City-owned communications service provider. – A city that provides
28 communications service using a communications network, whether directly,
29 indirectly, or through an interlocal agreement or a joint agency.
30 (2) Communications network. – A wired or wireless network for the provision
31 of communications service.
32 (3) Communications service. – The provision of cable, video programming,
33 telecommunications, broadband, or high-speed Internet access service to the
34 public, or any sector of the public, for a fee, regardless of the technology
35 used to deliver the service. The terms "cable service," "telecommunications
36 service," and "video programming service" have the same meanings as in
37 G.S. 105-164.3. Neither the sharing of data between the governmental



1 entities for governmental purposes nor the provision of free services to the
2 public or a subset thereof shall be considered the provision of
3 communications service.

4 (4) High-speed Internet access service. – Internet access service with
5 transmission speeds that are consistent with requirements for basic
6 broadband service as defined by the Federal Communications Commission.

7 (5) Interlocal agreement. – An agreement between units of local government as
8 authorized by Part 1 of Article 20 of Chapter 160A of the General Statutes.

9 (6) Joint agency. – A joint agency created under Part 1 of Article 20 of Chapter
10 160A of the General Statutes.

11 **"§ 160A-340.1. City-owned communications service provider requirements.**

12 (a) A city-owned communications service provider shall meet all of the following
13 requirements:

14 (1) Comply in its provision of communications service with all local, State, and
15 federal laws, regulations, or other requirements applicable to the provision of
16 the communications service if provided by a private communications service
17 provider.

18 (2) In accordance with the provisions of Chapter 159 of the General Statutes, the
19 Local Government Finance Act, establish one or more separate enterprise
20 funds for the provision of communications service, use the enterprise funds
21 to separately account for revenues, expenses, property, and source of
22 investment dollars associated with the provision of communications service,
23 and prepare and publish an independent annual report and audit in
24 accordance with generally accepted accounting principles that reflect the
25 fully allocated cost of providing the communications service, including all
26 direct and indirect costs. An annual independent audit conducted under
27 G.S. 159-34 and submitted to the Local Government Commission satisfies
28 the audit requirement of this subdivision.

29 (3) Limit the provision of communications service to within the corporate limits
30 of the city providing the communications service.

31 (4) Shall not, directly or indirectly, under the powers of a city, exercise power or
32 authority in any area, including zoning or land-use regulation, or exercise
33 power to withhold or delay the provision of monopoly utility service, to
34 require any person, including residents of a particular development, to use or
35 subscribe to any communications service provided by the city-owned
36 communications service provider.

37 (5) Shall provide nondiscriminatory access to private communications service
38 providers on a first-come, first-served basis to rights-of-way, poles, or
39 conduits owned, leased, or operated by the city unless the facilities have
40 insufficient capacity for the access and additional capacity cannot reasonably
41 be added to the facilities. For purposes of this subdivision, the term
42 "nondiscriminatory access" means that, at a minimum, access shall be
43 granted on the same terms and conditions as that given to a city-owned
44 communications service provider.

45 (6) Shall not air advertisements or other promotions for the city-owned
46 communications service on a public, educational, or governmental access
47 channel if the city requires another communications service provider to carry
48 the channel. The city shall not use city resources that are not allocated for
49 cost accounting purposes to the city-owned communications service to
50 promote city-owned communications service in comparison to private

1 services or, directly or indirectly, require city employees, officers, or
2 contractors to purchase city services.

3 (7) Shall not subsidize the provision of communications service with funds from
4 any other noncommunications service, operation, or other revenue source,
5 including any funds or revenue generated from electric, gas, water, sewer, or
6 garbage services.

7 (8) Shall not price any communications service below the cost of providing the
8 service, including any direct or indirect subsidies received by the city-owned
9 communications service provider and allocation of costs associated with any
10 shared use of buildings, equipment, vehicles, and personnel with other city
11 departments. The city shall, in calculating the costs of providing the
12 communications service, impute (i) the cost of the capital component that is
13 equivalent to the cost of capital available to private communications service
14 providers in the same locality and (ii) an amount equal to all taxes, including
15 property taxes, licenses, fees, and other assessments that would apply to a
16 private communications service provider, including federal, State, and local
17 taxes; rights-of-way, franchise, consent, or administrative fees; and pole
18 attachment fees.

19 (9) The city shall annually remit to the general fund of the city an amount
20 equivalent to all taxes or fees a private communications service provider
21 would be required to pay the city or county in which the city is located,
22 including any applicable tax refunds received by the city-owned
23 communications service provider because of its government status and a sum
24 equal to the amount of property tax that would have been due if the
25 city-owned communications service provider were a private communications
26 service provider.

27 (b) A city-owned communications service provider shall not be required to obtain voter
28 approval under G.S. 160A-321 prior to the sale or discontinuance of the city's communications
29 network.

30 **"§ 160A-340.2. Exemptions.**

31 (a) The provisions of G.S. 160A-340.1, 160A-340.4, 160A-340.5, and 160A-340.6 do
32 not apply to the purchase, lease, construction, or operation of facilities by a city to provide
33 communications service within the city's corporate limits for the city's internal governmental
34 purposes, including the sharing of data between governmental entities for governmental
35 purposes, or within the corporate limits of another unit of local government that is a party with
36 the city to an interlocal agreement under Part 1 of Article 20 of Chapter 160A of the General
37 Statutes for the provision of internal government services.

38 (b) The provisions of G.S. 160A-340.1, 160A-340.4, and 160A-340.5 do not apply to
39 the provision of communications service in an unserved area. A city seeking to provide
40 communications service in an unserved area shall petition the North Carolina Utilities
41 Commission for a determination that an area is unserved. The petition shall identify with
42 specificity the geographic area for which the designation is sought. Any private
43 communications service provider, or any other interested party, may, within a time established
44 by order of the Commission, which time shall be no fewer than 30 days, file with the
45 Commission an objection to the designation on the grounds that one or more areas designated
46 in the petition is not an unserved area or that the city is not otherwise eligible to provide the
47 service. For purposes of this subsection, the term "unserved area" means a geographical area in
48 which at least fifty percent (50%) of households either have no access to high-speed Internet
49 service or have access to high-speed Internet service only from a satellite provider.

50 (c) The provisions of G.S. 160A-340.1, 160A-340.3, 160A-340.4, 160A-340.5, and
51 160A-340.6 do not apply to a city or joint agency providing communications service as of

1 January 1, 2011, provided the city or joint agency limits the provision of communications
2 service to the following service area boundaries:

- 3 (1) For the joint agency operated by the cities of Davidson and Mooresville, the
4 service area is the service area designated in the initial notice of franchise
5 filed with the Secretary of State, and the contiguous area where the agency is
6 offering service as of the effective date of this act connecting the cities of
7 Davidson and Mooresville with areas set forth in the initial areas of
8 franchise.
- 9 (2) For the city of Salisbury, the service area is the corporate limits of the cities
10 of Salisbury, Spencer, East Spencer, Rockwell, Granite Quarry, and the
11 corridors between Salisbury and those cities only to the extent necessary to
12 provide service to those cities.
- 13 (3) For all other cities or joint agency offering communications service, the
14 service area is the area designated in the map filed as part of the initial notice
15 of franchise with the Secretary of State as of January 1, 2011.

16 **"§ 160A-340.3. Notice; public hearing.**

17 A city or joint agency that proposes to provide communications service shall hold not fewer
18 than two public hearings, which shall be held not less than 30 days apart, for the purpose of
19 gathering information and comment. Notice of the hearings shall be published at least once a
20 week for four consecutive weeks in the predominant newspaper of general circulation in the
21 area in which the city is located. The notice shall also be provided to the North Carolina
22 Utilities Commission, which shall post the notice on its Web site, and to all companies that
23 have requested service of the notices from the city clerk. The city shall deposit the notice in the
24 U.S. mail to companies that have requested notice at least 45 days prior to the hearing subject
25 to the notice. Private communications service providers shall be permitted to participate fully in
26 the public hearings by presenting testimony and documentation relevant to their service
27 offerings and the city's plans. Any feasibility study, business plan, or public survey conducted
28 or prepared by the city in connection with the proposed communications service project is a
29 public record as defined by G.S. 132-1 and shall be made available to the public prior to the
30 public hearings required by this section. This section does not apply to the repair, rebuilding,
31 replacement, or improvement of an existing communications network, or equipment relating
32 thereto.

33 **"§ 160A-340.4. Financing.**

34 (a) A city or joint agency subject to the provisions of G.S. 160A-340.1 shall not enter into
35 a contract under G.S. 160A-19 or G.S. 160A-20 to purchase or to finance the purchase of
36 property for use in a communications network or to finance the construction of fixtures or
37 improvements for use in a communications network unless it complies with subsection (b) of
38 this section. The provisions of this section shall not apply to the repair, rebuilding, replacement,
39 or improvement of an existing communications network, or equipment relating thereto.

40 (b) A city shall not incur debt for the purpose of constructing a communications system
41 without first holding a special election under G.S. 163-287 on the question of whether the city
42 should incur debt for the proposed purposes. If a majority of the votes cast in the special
43 election are for the city incurring the debt, the city may provide the communication service. If a
44 majority of the votes cast in the special election are against the city incurring the debt, the city
45 shall not provide the communications service. However, nothing in this section shall prohibit a
46 city from revising its plan to offer communications service and calling another special election
47 on the question prior to providing or offering to provide the service. A special election required
48 under Chapter 159 of the General Statutes as a condition to the issuance of bonds shall satisfy
49 the requirements of this section.

50 **"§ 160A-340.5. Taxes; payments in lieu of taxes.**

1 (a) A communications network owned or operated by a city or joint agency shall be
2 exempt from property taxes. However, each city possessing an ownership share of a
3 communications network and a joint agency owning a communications network shall, in lieu of
4 property taxes, pay to any county authorized to levy property taxes the amount which would be
5 assessed as taxes on real and personal property if the communications network were otherwise
6 subject to valuation and assessment. Any payments in lieu of taxes shall be due and shall bear
7 interest, if unpaid, as in the case of taxes on other property.

8 (b) A city-owned communications service provider shall pay to the State, on an annual
9 basis, an amount in lieu of taxes that would otherwise be due the State if the communications
10 service was provided by a private communications service provider, including State income,
11 franchise, vehicle, motor fuel, and other similar taxes. The amount of the payment in lieu of
12 taxes shall be set annually by the Department of Revenue and shall approximate the taxes that
13 would be due if the communications service was undertaken by a private communications
14 service provider. A city-owned communications provider must provide information requested
15 by the Secretary of Revenue necessary for calculation of the assessment. The Department must
16 inform each city-owned communications provider of the amount of the assessment by January
17 1 of each year. The assessment is due by March 15 of each year. If the assessment is unpaid,
18 the State may withhold the amount due, including interest on late payments, from distributions
19 otherwise due the city under G.S. 105-164.44I.

20 (c) A city-owned communications service provider or a joint agency that provides
21 communications service shall not be eligible for a refund under G.S. 105-164.14(c) for sales
22 and use taxes paid on purchases of tangible personal property and services related to the
23 provision of communications service, except to the extent a private communications service
24 provider would be exempt from taxation.

25 **"§ 160A-340.6. Public-private partnerships for communications service.**

26 (a) Prior to undertaking to construct a communications network for the provision of
27 communications service, a city shall first solicit proposals from private business in accordance
28 with the procedures of this section.

29 (b) The city shall issue requests for proposals that specifies the nature and scope of the
30 requested communications service, the area in which it is to be provided, any specifications and
31 performance standards, and information as to the city's proposed participation in providing
32 equipment, infrastructure, or other aspects of the service. The city may prescribe the form and
33 content of proposals, and may require that proposals contain sufficiently detailed information to
34 allow for an objective evaluation of proposals using the factors stated in subsection (c) of this
35 section. Each proposal shall at minimum contain all of the following:

- 36 (1) Information regarding the proposer's experience and qualifications to
37 perform the requirements of the proposal.
- 38 (2) Information demonstrating the proposer's ability to secure financing needed
39 to perform the requirements of the proposal.
- 40 (3) Information demonstrating the proposer's ability to provide staffing,
41 implement work tasks, and carry out all other responsibilities necessary to
42 perform the requirements of the proposal.
- 43 (4) Information clearly identifying and specifying all elements of cost of the
44 proposal for the term of the proposed contract, including the cost of the
45 purchase or lease of equipment and supplies, design, installation, operation,
46 management, and maintenance of any system, and any proposed services.
- 47 (5) Any other information the city determines has a material bearing on its
48 ability to evaluate the proposal.

49 (c) The city shall provide notice that it is requesting proposals in accordance with this
50 subsection. The notice shall state the time and place where plans and specifications for the
51 proposed service may be obtained and the time and place for opening proposals. Any notice

1 given under this subsection shall reserve to the city the right to reject any or all proposals.

2 Notice of request for proposals shall be given by all of the following methods:

3 (1) By mailing a notice of request for proposals to each firm that has obtained a
4 license or permit to use the public rights-of-way in the city to provide a
5 communications service within the city by depositing such notices in the
6 U.S. mail at least 30 days prior to the date specified for the opening of
7 proposals. In identifying firms, the city may rely upon lists provided by the
8 Office of the Secretary of State and the North Carolina Utilities
9 Commission.

10 (2) By posting a notice of request for proposals on the city's web site at least 30
11 days before the time specified for the opening of proposals.

12 (3) By publishing a notice of request for proposals in a newspaper of general
13 circulation in the county in which the city is predominantly located at least
14 30 days before the time specified for the opening of proposals.

15 (d) In evaluating proposals, the city may consider any relevant factors, including system
16 design, system reliability, operational experience, operational costs, compatibility with existing
17 systems and equipment, and emerging technology. The city may negotiate aspects of any
18 proposal with any responsible proposer with regard to these factors to determine which
19 proposal is the most responsive. A determination of most responsive proposer by the city shall
20 be final.

21 (e) The city may negotiate a contract with the most responsive proposer for the
22 performance of communications services specified in the request for proposals. All contracts
23 entered into pursuant to this section shall be approved and awarded by the governing body of
24 the city.

25 (f) If the city is unable to successfully negotiate the terms of a contract with the most
26 responsive proposer with 60 days of the opening of the proposals, the city may proceed to
27 negotiate with the firm determined to be the next most responsive proposer if such a proposer
28 exists. If the city is unable to successfully negotiate the terms of a contract with the next most
29 responsive proposer within 60 days, it may proceed under this Article to provide
30 communications services.

31 (g) All proposals shall be sealed and shall be opened in public."

32 **SECTION 1.(b)** G.S. 105-164.14 is amended by adding a new subsection to read:

33 "(d2) A city subject to the provisions of G.S. 160A-340.5 is not allowed a refund of sales
34 and use taxes paid by it under this Article for purchases related to the provision of
35 communications services as defined in Article 16A of Chapter 160A."

36 **SECTION 1.(c)** Subsection (b) of this section is effective when it becomes law and
37 applies to sales made on or after that date.

38 **SECTION 2.(a)** G.S. 62-3(23) is amended by adding the following new
39 sub-subdivision to read:

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

44 **SECTION 2.(b)** This section shall not be construed to change the regulatory nature
45 of or requirements applicable to any particular service currently regulated by the Commission
46 under Chapter 62 of the General Statutes.

47 **SECTION 3.** Subchapter IV of Chapter 159 of the General Statutes is amended by
48 adding a new Article to read as follows:

49 "Article 9A.

50 "Borrowing by Cities for Competitive Purposes.

1 "§ 159-175.10. Additional requirements for review of city financing application;
2 communications service.

3 The Commission shall apply additional requirements to an application for financing by a
4 city or a joint agency under Part 1 of Article 20 of Chapter 160A of the General Statutes for the
5 construction, operation, expansion, or repair of a communications system or other infrastructure
6 for the purpose of offering communications service, as that term is defined in
7 G.S. 160A-340(2), that is or will be competitive with communications service offered by a
8 private communications service provider. This section does not apply to the repair, rebuilding,
9 replacement, or improvement of an existing communications network, or equipment relating
10 thereto, but does apply to the expansion of such existing network. The additional requirements
11 are the following:

- 12 (1) Prior to submitting an application to the Commission, a city or joint agency
13 shall comply with the provisions of G.S. 160A-340.3 requiring at least two
14 public hearings on the proposed communications service project and notice
15 of the hearings to private communications service providers who have
16 requested notice.
- 17 (2) At the same time the application is submitted to the Commission, the city or
18 joint agency shall serve a copy of the application on each person that
19 provides competitive communications service within the city's jurisdictional
20 boundaries or in areas adjacent to the city. No hearing on the application
21 shall be heard by the Commission until at least 60 days after the application
22 is submitted to the Commission.
- 23 (3) Upon the request of a communications service provider, the Commission
24 shall accept written and oral comments from competitive private
25 communications service providers in connection with any hearing or other
26 review of the application.
- 27 (4) In considering the probable net revenues of the proposed communications
28 service project, the Commission shall consider and make written findings on
29 the reasonableness of the city or joint agency's revenue projections in light of
30 the current and projected competitive environment for the services to be
31 provided, taking into consideration the potential impact of technological
32 innovation and change on the proposed service offerings and the level of
33 demonstrated community support for the project.
- 34 (5) The city or joint agency making the application to the Commission shall bear
35 the burden of persuasion with respect to subdivisions (1) through (4) of this
36 section."

37 **SECTION 4.** G.S. 159-81(3) is amended by adding a new sub-subdivision to read:

38 "q. Cable television systems."

39 **SECTION 5.** Sections 2, 3, and 4 of this act do not apply to a city or joint agency
40 providing communications service as of January 1, 2011, provided the city limits the provision
41 of communications service to the service area boundaries in G.S. 160A-340.2(c).

42 **SECTION 6.** Any city that is designated as a public utility under Chapter 62 of the
43 General Statutes when this act becomes law shall not be subject to the provisions of this act
44 with respect to any of its operations that are authorized by that Chapter.

45 **SECTION 7.** If any provision of this act or the application thereof to any person or
46 circumstance is held invalid, the invalidity shall not affect other provisions or applications of
47 this act which can be given effect without the invalid provision or application, and to that end
48 the provisions of this act are declared to be severable.

49 **SECTION 8.** Except as otherwise provided, this act is effective when it becomes
50 law and applies to the provision of communications service by a city or joint agency under Part
51 1 of Article 20 of Chapter 160A of the General Statutes on and after that date.