

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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HOUSE BILL 129*

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

Sponsors: Representatives Avila, Howard, Carney, and Wainwright (Primary Sponsors).
For a complete list of Sponsors, see Bill Information on the NCGA Web Site.

Referred to: Public Utilities, if favorable, Finance.

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

23 "Article 16A. Provision of Communications Service by Cities.

24 "**§ 160A-340. Definitions.**

25 The following definitions apply in this Article:

- 26 (1) City-owned communications service provider. – A city that provides
27 communications service using a communications network, whether directly,
28 indirectly, or through an interlocal agreement or a joint agency.
29 (2) Communications network. – A wired or wireless network for the provision
30 of communications service.
31 (3) Communications service. – The provision of cable, video programming,
32 telecommunications, broadband, or high-speed Internet access service to the
33 public, or any sector of the public, for a fee, regardless of the technology
34 used to deliver the service. The terms "cable service," "telecommunications



1 service," and "video programming service" have the same meanings as in
2 G.S. 105-164.3.

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

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

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

10 **"§ 160A-340.1. City-owned communications service provider requirements.**

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

13 (1) Comply with all local, State, and federal laws, regulations, or other
14 requirements that would apply to the communications service if provided by
15 a private communications service provider.

16 (2) In accordance with the provisions of the Local Government Finance Act,
17 being Chapter 159 of the General Statutes, establish one or more separate
18 enterprise funds for the provision of communications service, use the
19 enterprise funds to separately account for revenues, expenses, property, and
20 source of investment dollars associated with the provision of
21 communications service, and prepare and publish an independent annual
22 report and audit in accordance with generally accepted accounting principles
23 that reflect the fully allocated cost of providing the communications service,
24 including all direct and indirect costs.

25 (3) Provide communications service only within the jurisdictional boundaries of
26 the city providing the communications service.

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

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

41 (6) Shall not air advertisements or other promotions for the city-owned
42 communications service on the city's public, educational, or governmental
43 access channel, use city resources that are not allocated for cost accounting
44 purposes to the city-owned communications service to promote city services
45 in comparison to private services or, directly or indirectly, require city
46 employees, officers, or contractors to purchase city services.

47 (7) Shall not subsidize the provision of communications service with funds from
48 any other noncommunications service, operation, or other revenue source,
49 including any funds or revenue generated from electric, gas, water, sewer, or
50 garbage services.

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

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

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

24 (c) G.S. 160A-340.1(a)(7) through (9) shall not apply to communications service
25 provided by a city on or before January 1, 2011.

26 **"§ 160A-340.2. Exemptions.**

27 (a) The provisions of G.S. 160A-340.1, 160A-340.4, and 160A-340.5 do not apply to
28 the purchase, lease, construction, or operation of facilities by a city to provide communications
29 service within the city's jurisdictional boundaries for the city's internal governmental purposes.

30 (b) The provisions of G.S. 160A-340.1, 160A-340.4, and 160A-340.5 do not apply to
31 the provision of communications service in an unserved area. A city seeking to provide
32 communications service in an unserved area shall petition the North Carolina Utilities
33 Commission for a determination that an area is unserved. The petition shall identify with
34 specificity the geographic area for which the designation is sought. Any private
35 communications service provider, or any other interested party, may, within a time established
36 by order of the Commission, which time shall be no fewer than 30 days, file with the
37 Commission an objection to the designation on the grounds that one or more areas designated
38 in the petition is not an unserved area or that the city is not otherwise eligible to provide the
39 service. For purposes of this subsection, the term "unserved area" means a geographical area in
40 which at least ninety percent (90%) of households either have no access to high-speed Internet
41 service or have access to high-speed Internet service only from a satellite provider.

42 **"§ 160A-340.3. Notice; public hearing.**

43 A city that proposes to provide communications service shall hold not less than two public
44 hearings, which shall be held not fewer than 30 days apart, for the purpose of gathering
45 information and comment. Notice of the hearings shall be published at least once a week for
46 four consecutive weeks in the predominant newspaper of general circulation in the area in
47 which the city is located. The notice shall also be provided to the North Carolina Utilities
48 Commission, which shall post the notice on its Web site, and to all companies that have
49 requested service of the notices from the city clerk. The city shall deposit the notice in the U.S.
50 mail to companies that have requested notice at least 45 days prior to the hearing subject to the
51 notice. Private communications service providers shall be permitted to participate fully in the

1 public hearings by presenting testimony and documentation relevant to their service offerings
2 and the city's plans. Any feasibility study, business plan, or public survey conducted or
3 prepared by the city in connection with the proposed communications service project is a public
4 record as defined by G.S. 132-1 and shall be made available to the public prior to the public
5 hearings required by this section.

6 **"§ 160A-340.4. Financing.**

7 A city or joint agency subject to the provisions of G.S. 160A-340.1 shall not enter into a
8 contract under G.S. 160A-19 or G.S. 160A-20 to purchase or to finance or refinance the
9 purchase of property for use in a communications network or to finance or refinance the
10 construction of fixtures or improvements for use in a communications network. The provisions
11 of this section shall not apply to the repair or improvement of an existing communications
12 network.

13 **"§ 160A-340.5. Taxes; payments in lieu of taxes.**

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

21 (b) A city-owned communications service provider shall pay to the State, on an annual
22 basis, an amount in lieu of taxes that would otherwise be due the State if the communications
23 service was provided by a private communications service provider, including State income,
24 franchise, vehicle, motor fuel, and other similar taxes. The amount of the payment in lieu of
25 taxes shall be set annually by the Department of Revenue and shall approximate the taxes that
26 would be due if the communications service was undertaken by a private communications
27 service provider. If the assessment is unpaid, the State may withhold the amount due, including
28 interest on late payments, from distributions otherwise due the city under G.S. 105-164.44I.

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

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

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

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

42 "Article 9A. Borrowing by Cities for Competitive Purposes.

43 **"§ 159-175.10. Additional requirements for review of city financing application;
44 communications service.**

45 The Commission shall apply the following additional requirements to an application for
46 financing by a city or a joint agency under Part 1 of Article 20 of Chapter 160A of the General
47 Statutes for the construction, operation, expansion, or repair of a communications system or
48 other infrastructure for the purpose of offering communications service, as that term is defined
49 in G.S. 160A-340(2), that is or will be competitive with communications service offered by a
50 private communications service provider:

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

26 **SECTION 4.** Any city that is designated as a public utility under Chapter 62 of the
27 General Statutes when this act becomes law shall not be subject to the provisions of this act
28 with respect to any of its operations that are authorized by that Chapter.

29 **SECTION 5.** If any provision of this act or the application thereof to any person or
30 circumstance is held invalid, the invalidity shall not affect other provisions or applications of
31 this act which can be given effect without the invalid provision or application, and to that end
32 the provisions of this act are declared to be severable.

33 **SECTION 6.** This act is effective when it becomes law and applies to the provision
34 of communications service by a city or joint agency under Part 1 of Article 20 of Chapter 160A
35 of the General Statutes on and after that date.