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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



1 service," and "video programming service" have the same meanings as in
2 G.S. 105-164.3. Neither the sharing of data between the governmental
3 entities for governmental purposes nor the provision of free services to the
4 public or a subset thereof shall be considered the provision of
5 communications service.

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

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

11 (6) Joint agency. – A joint agency created under Part 1 of Article 20 of Chapter
12 160A of the General Statutes.

13 **§ 160A-340.1. City-owned communications service provider requirements.**

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

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

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

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

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

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

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

1 promote city-owned communications service in comparison to private
2 services or, directly or indirectly, require city employees, officers, or
3 contractors to purchase city services.

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

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

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

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

34 **"§ 160A-340.2. Exemptions.**

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

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

1 which at least fifty percent (50%) of households either have no access to high-speed Internet
2 service or have access to high-speed Internet service only from a satellite provider.

3 (c) The provisions of G.S. 160A-340.1, 160A-340.3, 160A-340.4, 160A-340.5, and
4 160A-340.6 do not apply to a city or joint agency providing communications service as of
5 January 1, 2011, provided the city or joint agency limits the provision of communications
6 service to any one or more of the following:

7 (1) Persons within the corporate limits of the city providing the communications
8 service.

9 (2) Existing customers of the communications service as of April 1, 2011.
10 Service to customers outside the service area of the city or joint agency shall
11 comply with the open bidding procedures of Article 8 of Chapter 143 upon
12 the expiration or termination of the existing service contract.

13 (3) The following service areas:

14 a. For the joint agency operated by the cities of Davidson and
15 Mooresville, the service area is the service area designated in the
16 initial notice of franchise filed with the Secretary of State, and the
17 contiguous area where the agency is offering service as of the
18 effective date of this act connecting the cities of Davidson and
19 Mooresville with areas set forth in the initial areas of franchise.

20 b. For the city of Salisbury, the service area is the corporate limits of
21 the cities of Salisbury, Spencer, East Spencer, Rockwell, Granite
22 Quarry, and the corridors between Salisbury and those cities only to
23 the extent necessary to provide service to those cities.

24 c. For all other cities or joint agencies offering communications service,
25 the service area is the area designated in the map filed as part of the
26 initial notice of franchise with the Secretary of State as of January 1,
27 2011.

28 **"§ 160A-340.3. Notice; public hearing.**

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

45 **"§ 160A-340.4. Financing.**

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

1 **(b)** A city shall not incur debt for the purpose of constructing a communications system
2 without first holding a special election under G.S. 163-287 on the question of whether the city
3 should incur debt for the proposed purposes. If a majority of the votes cast in the special
4 election are for the city incurring the debt, the city may provide the communication service. If a
5 majority of the votes cast in the special election are against the city incurring the debt, the city
6 shall not provide the communications service. However, nothing in this section shall prohibit a
7 city from revising its plan to offer communications service and calling another special election
8 on the question prior to providing or offering to provide the service. A special election required
9 under Chapter 159 of the General Statutes as a condition to the issuance of bonds shall satisfy
10 the requirements of this section.

11 **"§ 160A-340.5. Taxes; payments in lieu of taxes.**

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

19 **(b)** A city-owned communications service provider shall pay to the State, on an annual
20 basis, an amount in lieu of taxes that would otherwise be due the State if the communications
21 service was provided by a private communications service provider, including State income,
22 franchise, vehicle, motor fuel, and other similar taxes. The amount of the payment in lieu of
23 taxes shall be set annually by the Department of Revenue and shall approximate the taxes that
24 would be due if the communications service was undertaken by a private communications
25 service provider. A city-owned communications provider must provide information requested
26 by the Secretary of Revenue necessary for calculation of the assessment. The Department must
27 inform each city-owned communications provider of the amount of the assessment by January
28 1 of each year. The assessment is due by March 15 of each year. If the assessment is unpaid,
29 the State may withhold the amount due, including interest on late payments, from distributions
30 otherwise due the city under G.S. 105-164.44I.

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

36 **"§ 160A-340.6. Public-private partnerships for communications service.**

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

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

- 47 **(1)** Information regarding the proposer's experience and qualifications to
48 perform the requirements of the proposal.
- 49 **(2)** Information demonstrating the proposer's ability to secure financing needed
50 to perform the requirements of the proposal.

1 (3) Information demonstrating the proposer's ability to provide staffing,
2 implement work tasks, and carry out all other responsibilities necessary to
3 perform the requirements of the proposal.

4 (4) Information clearly identifying and specifying all elements of cost of the
5 proposal for the term of the proposed contract, including the cost of the
6 purchase or lease of equipment and supplies, design, installation, operation,
7 management, and maintenance of any system, and any proposed services.

8 (5) Any other information the city determines has a material bearing on its
9 ability to evaluate the proposal.

10 (c) The city shall provide notice that it is requesting proposals in accordance with this
11 subsection. The notice shall state the time and place where plans and specifications for the
12 proposed service may be obtained and the time and place for opening proposals. Any notice
13 given under this subsection shall reserve to the city the right to reject any or all proposals.
14 Notice of request for proposals shall be given by all of the following methods:

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

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

24 (3) By publishing a notice of request for proposals in a newspaper of general
25 circulation in the county in which the city is predominantly located at least
26 30 days before the time specified for the opening of proposals.

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

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

37 (f) If the city is unable to successfully negotiate the terms of a contract with the most
38 responsive proposer with 60 days of the opening of the proposals, the city may proceed to
39 negotiate with the firm determined to be the next most responsive proposer if such a proposer
40 exists. If the city is unable to successfully negotiate the terms of a contract with the next most
41 responsive proposer within 60 days, it may proceed under this Article to provide
42 communications services.

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

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

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

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

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

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

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

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

11 **SECTION 8.** Except as otherwise provided, this act is effective when it becomes
12 law and applies to the provision of communications service by a city or joint agency under Part
13 1 of Article 20 of Chapter 160A of the General Statutes on and after that date.