

**GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2011**

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**SENATE BILL 87\***

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

Sponsors: Senators Apodaca; Harrington, Hise, Meredith, Rabon, Rouzer, and Rucho.

Referred to: Judiciary I.

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



- 1           (4) High-speed Internet access service. – Internet access service with  
2 transmission speeds that are consistent with requirements for basic  
3 broadband service as defined by the Federal Communications Commission.  
4           (5) Interlocal agreement. – An agreement between units of local government as  
5 authorized by Part 1 of Article 20 of Chapter 160A of the General Statutes.  
6           (6) Joint agency. – A joint agency created under Part 1 of Article 20 of Chapter  
7 160A of the General Statutes.

8 **"§ 160A-340.1. City-owned communications service provider requirements.**

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

- 11           (1) Comply with all local, State, and federal laws, regulations, or other  
12 requirements that would apply to the communications service if provided by  
13 a private communications service provider.  
14           (2) In accordance with the provisions of the Local Government Finance Act,  
15 being Chapter 159 of the General Statutes, establish one or more separate  
16 enterprise funds for the provision of communications service, use the  
17 enterprise funds to separately account for revenues, expenses, property, and  
18 source of investment dollars associated with the provision of  
19 communications service, and prepare and publish an independent annual  
20 report and audit in accordance with generally accepted accounting principles  
21 that reflect the fully allocated cost of providing the communications service,  
22 including all direct and indirect costs.  
23           (3) Provide communications service only within the jurisdictional boundaries of  
24 the city providing the communications service.  
25           (4) Shall not, directly or indirectly, under the powers of a city, exercise power or  
26 authority in any area, including zoning or land-use regulation, or exercise  
27 power to withhold or delay the provision of monopoly utility service, to  
28 require any person, including residents of a particular development, to use or  
29 subscribe to any communications service provided by the city-owned  
30 communications service provider.  
31           (5) Shall provide nondiscriminatory access to private communications service  
32 providers on a first-come, first-served basis to rights-of-way, poles, conduits,  
33 or other permanent distribution facilities owned, leased, or operated by the  
34 city unless the facilities have insufficient capacity for the access and  
35 additional capacity cannot reasonably be added to the facilities. For purposes  
36 of this subdivision, the term "nondiscriminatory access" means that, at a  
37 minimum, access shall be granted on the same terms and conditions as that  
38 given to a city-owned communications service provider.  
39           (6) Shall not air advertisements or other promotions for the city-owned  
40 communications service on the city's public, educational, or governmental  
41 access channel, use city resources that are not allocated for cost accounting  
42 purposes to the city-owned communications service to promote city services  
43 in comparison to private services or, directly or indirectly, require city  
44 employees, officers, or contractors to purchase city services.  
45           (7) Shall not subsidize the provision of communications service with funds from  
46 any other noncommunications service, operation, or other revenue source,  
47 including any funds or revenue generated from electric, gas, water, sewer, or  
48 garbage services.  
49           (8) Shall not price any communications service below the cost of providing the  
50 service, including any direct or indirect subsidies received by the city-owned  
51 communications service provider and allocation of costs associated with any

1 shared use of buildings, equipment, vehicles, and personnel with other city  
2 departments. The city shall, in calculating the costs of providing the  
3 communications service, impute (i) the cost of the capital component that is  
4 equivalent to the cost of capital available to private communications service  
5 providers in the same locality and (ii) an amount equal to all taxes, including  
6 property taxes, licenses, fees, and other assessments that would apply to a  
7 private communications service provider including federal, State, and local  
8 taxes; rights-of-way, franchise, consent, or administrative fees; and pole  
9 attachment fees.

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

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

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

23 **"§ 160A-340.2. Exemptions.**

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

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

39 **"§ 160A-340.3. Notice; public hearing.**

40 A city that proposes to provide communications service shall hold not less than two public  
41 hearings, which shall be held not fewer than 30 days apart, for the purpose of gathering  
42 information and comment. Notice of the hearings shall be published at least once a week for  
43 four consecutive weeks in the predominant newspaper of general circulation in the area in  
44 which the city is located. The notice shall also be provided to the North Carolina Utilities  
45 Commission, which shall post the notice on its Web site, and to all companies that have  
46 requested service of the notices from the city clerk. The city shall deposit the notice in the U.S.  
47 mail to companies that have requested notice at least 45 days prior to the hearing subject to the  
48 notice. Private communications service providers shall be permitted to participate fully in the  
49 public hearings by presenting testimony and documentation relevant to their service offerings  
50 and the city's plans. Any feasibility study, business plan, or public survey conducted or  
51 prepared by the city in connection with the proposed communications service project is a public

1 record as defined by G.S. 132-1 and shall be made available to the public prior to the public  
2 hearings required by this section.

3 **"§ 160A-340.4. Financing.**

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

10 **"§ 160A-340.5. Taxes; payments in lieu of taxes.**

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

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

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

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

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

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

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

40 **"§ 159-175.10. Additional requirements for review of city financing application;**  
41 **communications service.**

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

48 (1) Prior to submitting an application to the Commission, a city or joint agency  
49 shall comply with the provisions of G.S. 160A-340.3 requiring at least two  
50 public hearings on the proposed communications service project and notice

1 of the hearings to private communications service providers who have  
2 requested notice.

3 (2) At the same time the application is submitted to the Commission, the city or  
4 joint agency shall serve a copy of the application on each person that  
5 provides competitive communications service within the city's jurisdictional  
6 boundaries or in areas adjacent to the city. No hearing on the application  
7 shall be heard by the Commission until at least 60 days after the application  
8 is submitted to the Commission.

9 (3) Upon the request of a communications service provider, the Commission  
10 shall accept written and oral comments from competitive private  
11 communications service providers in connection with any hearing or other  
12 review of the application.

13 (4) In considering the probable net revenues of the proposed communications  
14 service project, the Commission shall consider and make written findings on  
15 the reasonableness of the city or joint agency's revenue projections in light of  
16 the current and projected competitive environment for the services to be  
17 provided, taking into consideration the potential impact of technological  
18 innovation and change on the proposed service offerings and the level of  
19 demonstrated community support for the project.

20 (5) The city or joint agency making the application to the Commission shall bear  
21 the burden of persuasion with respect to subdivisions (1) through (4) of this  
22 section."

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

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

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