

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2011

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HOUSE BILL 129\*  
PROPOSED COMMITTEE SUBSTITUTE H129-PCS70109-TDx-8

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



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

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

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

12 (6) Joint agency. – A joint agency created under Part 1 of Article 20 of Chapter  
13 160A of the General Statutes.

14 **"§ 160A-340.1. City-owned communications service provider requirements.**

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

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

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

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

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

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

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

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

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

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

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

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

32 **"§ 160A-340.2. Exemptions.**

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

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

1       (c) The provisions of G.S. 160A-340.1, 160A-340.3, 160A-340.4, 160A-340.5, and  
2 160A-340.6 do not apply to a city or joint agency providing communications service as of  
3 January 1, 2011, provided the city or joint agency limits the provision of communications  
4 service to the following service area boundaries:

5           (1) For the joint agency operated by the cities of Davidson and Mooresville, the  
6 service area is the service area designated in the initial notice of franchise  
7 filed with the Secretary of State, and the contiguous area where the agency is  
8 offering service as of the effective date of this act connecting the cities of  
9 Davidson and Mooresville with areas set forth in the initial areas of  
10 franchise.

11           (2) For the city of Salisbury, the service area is the corporate limits of the cities  
12 of Salisbury, Spencer, East Spencer, Rockwell, Granite Quarry, and the  
13 corridors between Salisbury and those cities only to the extent necessary to  
14 provide service to those cities.

15           (3) For all other cities or joint agency offering communications service, the  
16 service area is the area designated in the map filed as part of the initial notice  
17 of franchise with the Secretary of State as of January 1, 2011.

18 **"§ 160A-340.3. Notice; public hearing.**

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

35 **"§ 160A-340.4. Financing.**

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

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

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

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

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

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

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

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

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

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

(c) The city shall provide notice that it is requesting proposals in accordance with this subsection. The notice shall state the time and place where plans and specifications for the

1 proposed service may be obtained and the time and place for opening proposals. Any notice  
2 given under this subsection shall reserve to the city the right to reject any or all proposals.  
3 Notice of request for proposals shall be given by all of the following methods:

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

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

13 (3) By publishing a notice of request for proposals in a newspaper of general  
14 circulation in the county in which the city is predominantly located at least  
15 30 days before the time specified for the opening of proposals.

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

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

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

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

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

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

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

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

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

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

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

50 "Article 9A.

51 "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.