

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007**

H

1

HOUSE BILL 1587

Short Title: The Local Gov't Fair Competition Act. (Public)

Sponsors: Representatives Saunders, Holliman, Brubaker, Howard (Primary Sponsors); and Cole.

Referred to: Public Utilities, if favorable, Finance.

April 19, 2007

A BILL TO BE ENTITLED
AN ACT ESTABLISHING REQUIREMENTS FOR LOCAL GOVERNMENTS
THAT PROVIDE COMMUNICATIONS SERVICES TO THE PUBLIC.

The General Assembly of North Carolina enacts:

SECTION 1. Article 16 of Chapter 160A of the General Statutes is amended by adding a new Part to read:

"Part 1A. Local Government Owned or Operated Communications Service.

"§ 160A-329. Definitions.

The following definitions apply in this Part:

- (1) Local government. – A city as defined in G.S. 160A-1(2).
- (2) Local government owned communications service provider. – A local government which operates a public enterprise under G.S. 106A-311 that provides communications services to the public for a fee over a facility, operation, or system that is directly or indirectly owned or operated by or provides a financial benefit to the local government or another local government.
- (3) Communications network. – A wired or wireless network for the provision of communications service.
- (4) Communications service. – The provision of any of the following services to the public or any sector of the public: (i) cable service, as defined in G.S. 66-350(1); (ii) the conveyance or transmittal of messages or communications by telephone or telegraph while operating as a public utility, as defined in Chapter 62 of the General Statutes, (iii) the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points, including transmission, conveyance, or routing in which a computer processing application is used to act on the form, code, or protocol of the content for purposes of the

1 transmission, conveyance, or routing, without regard to whether the
2 service is referred to as Voice-over-Internet Protocol or is classified by
3 the Federal Communications Commission as enhanced or value-added;
4 and (iv) Internet access service.

5 **"§ 160A-329.1. Authority of local governments unaffected.**

6 Nothing in this Part shall be interpreted as granting authority to a local government
7 to own, lease, or operate a communications network or to provide communications
8 service over a communications network. However, any authority of a local government
9 to own, lease, or operate a communications network or to provide communications
10 service over a communications network shall be as otherwise provided by law and is not
11 restricted or altered by this Part. Nothing in this Part shall apply to the purchasing,
12 leasing, constructing, or equipping of facilities by a local government that is designed to
13 provide communications services within the local government's boundaries and is used
14 by the local government for its own internal purposes.

15 **"§ 160A-329.2. Public hearing; referendum prior to communications service.**

16 (a) A local government that proposes to provide communications services to the
17 public through a local government owned communications service provider shall hold
18 not less than two public hearings, which shall be held not less than 30 days apart, for the
19 purpose of gathering information and comment on the need for and the cost of the
20 communications service. At least 30 days prior to each public hearing held under this
21 section, the local government shall cause notice to be published in the predominant
22 newspaper of general circulation in the area considered for service and shall provide
23 notice to the North Carolina Utilities Commission (Utilities Commission), which shall
24 post the notice on its Web site.

25 (b) At a public hearing held under this section, a local government shall, at a
26 minimum, consider all of the following:

27 (1) Whether the proposed communications service is currently being
28 offered in the area considered for service and, if that is the case,
29 whether the communications service is generally available throughout
30 the area considered for service.

31 (2) If the same or similar communications service is not currently being
32 offered, whether any other service provider proposes to offer the same
33 or similar communications service.

34 (3) The capital investment required by the local government to provide the
35 communications service through a local government owned
36 communications service provider, the estimated cost of operation and
37 maintenance of the communications service and, using a fully
38 allocated cost accounting method, the estimated revenues and expenses
39 of providing the communications service and the proposed method of
40 financing. Buildings, equipment, vehicles, and personnel that are
41 jointly used by the local government owned communications service
42 provider and other local government departments shall be fully
43 allocated to the local government owned communications service
44 provider.

1 (4) The private and public costs and the benefits of providing the
2 communications service through a private communications service
3 provider compared to a local government owned communications
4 service provider, including the effect on existing and future jobs,
5 actual economic development prospects, tax-base growth, education,
6 and public health.

7 (c) At the public hearings held under this section, the local government shall
8 make available to the public a written business plan for the proposed local government
9 owned communications service provider that, at a minimum, contains all of the
10 following:

11 (1) The projected number of users to be served by the local government
12 owned communications service provider.

13 (2) The geographical area to be served by the local government owned
14 communications service provider.

15 (3) The types of communications service to be provided.

16 (4) A plan to ensure that revenues exceed operating expenses and that the
17 payment of principal and interest on debt will occur within four years
18 after the communications service is first provided.

19 (5) The estimated capital and operational costs and revenues for the first
20 four years that communications service is provided.

21 (6) The projected network modernization and technological upgrade plans,
22 including estimated costs.

23 (7) The projected schedule for offering the communications service.

24 (d) Upon making specific findings as to the factors in subsections (b) and (c) of
25 this section, the local government shall, by a majority vote, call for a special election
26 under G.S. 163-287 on the question of whether the local government shall provide the
27 proposed communications service to the public through a local government owned
28 communications service provider. If a majority of the votes cast in the special election
29 are for the local government providing communications service, the local government
30 may provide the communications service as authorized in this Part. If a majority of the
31 votes cast in the special election are against the local government providing
32 communications service, the local government shall not provide the communications
33 service. However, nothing in this Part shall prohibit a local government from revising
34 its plan to offer communications service and calling another special election on the
35 question prior to providing or offering to provide the service. A special election under
36 this section shall be held before the local government may provide or offer to provide
37 communications service. An election held by the local government before providing or
38 offering to provide communications service for the authorization to issue bonds to
39 finance the provision of the communications service shall satisfy the requirements of
40 this subsection.

41 **"§ 160A-329.3. Bond authority.**

42 (a) A local government may issue one or more bonds as provided by Chapter 159
43 of the General Statutes or any other provision of general or local law to finance the
44 capital costs for facilities necessary to provide communications service to the public

1 through a local government owned communications service provider. A bond issued
2 pursuant to this section shall be secured and paid for solely from the revenues generated
3 by the local government owned communications service provider. A local government
4 may not pay the origination, financing, or other carrying costs associated with bonds
5 issued under this section from the local government's general fund or public enterprise
6 funds.

7 (b) Nothing in this section shall be interpreted as granting a local government
8 authority to issue bonds that is not provided by Chapter 159 of the General Statutes or
9 any other provision of general or local law.

10 **"§ 160A-329.4. General operating limitations.**

11 Notwithstanding any other provision of law, a local government owned
12 communications service provider:

13 (1) Shall comply with all local, State, and federal laws, regulations, or
14 other requirements that apply to the provision of communications by a
15 private communications service provider, including regulation by the
16 North Carolina Utilities Commission to the extent that the local
17 government owned communications service provider is acting as a
18 public utility and regulation under Article 42 of Chapter 66 of the
19 General Statutes to the extent that the local government owned
20 communications service provider is providing cable service.

21 (2) Shall not subsidize the cost of providing communications service with
22 funds from any other noncommunications service, operation, or other
23 revenue source, including any funds or revenue generated from
24 electric, gas, water, sewage, or garbage services. In complying with
25 this requirement, a local government owned communications service
26 provider shall not price any communications service below the cost of
27 providing the service. If a determination is made that a direct or
28 indirect subsidy has been made, the local government owned
29 communications service provider shall immediately increase prices for
30 the communications service in a manner that ensures that the subsidy
31 shall not continue, and any amounts used directly or indirectly to
32 subsidize the past operations shall be reimbursed to the local
33 government's general fund.

34 (3) Shall not, directly or indirectly, under the powers of a local
35 government, exercise the power of eminent domain to condemn any
36 plant, equipment, or real property owned by a private communications
37 service provider for the purpose of providing communications service.

38 (4) Shall not, directly or indirectly, under the powers of a local
39 government, exercise power or authority in any area, including zoning
40 or land-use regulation, to require any person, including residents of a
41 particular development, to use or subscribe to any communications
42 service provided by the local government owned communications
43 service provider.

- 1 (5) Shall, in calculating the cost incurred and in the rates to be charged for
2 the provision of communications services, impute: (i) the cost of the
3 capital component that is the equivalent to the cost of capital available
4 to private communications service providers in the same locality; and
5 (ii) an amount equal to all taxes, including property taxes, licenses,
6 fees, and other assessments that would apply to a private
7 communications service provider including federal, state, and local
8 taxes; rights-of-way, franchise, consent, or administrative fees; and
9 pole attachment fees.
- 10 (6) Shall annually remit to the general fund of the local government
11 owning or having an economic interest in the communications service
12 provider an amount equivalent to all taxes or fees a private
13 communications service provider would be required to pay the local
14 government or county in which the local government is located,
15 including any applicable tax refunds received by the local government
16 owned communications service provider because of its local
17 government status. The amount remitted to the local government's
18 general fund shall include a sum equal to the amount of property tax
19 that would have been due if the local government owned
20 communications service provider were a private communications
21 service provider.
- 22 (7) Shall provide nondiscriminatory access to private communications
23 service providers on a first-come, first-served basis to rights-of-way,
24 poles, conduits, or other permanent distribution facilities owned,
25 leased, or operated by the local government unless the facilities have
26 insufficient capacity for the access and additional capacity cannot
27 reasonably be added to the facilities. For purposes of this subdivision,
28 the term "nondiscriminatory access" means that, at a minimum, access
29 shall be granted on the same terms and conditions as that given to a
30 local government owned communications service provider and at rates
31 that do not exceed the rates prescribed for attachments by cable service
32 providers providing cable service as provided in 47 U.S.C. § 224(e) of
33 the Communications Act of 1934, as amended, and in 47 C.F.R. §
34 1.1409(e)(1).
- 35 (8) Shall keep separate books and shall separately account for revenues,
36 expenses, property, and source of investment dollars associated with
37 the provision of communications service.
- 38 (9) Shall prepare and publish an independent annual audit in accordance
39 with generally accepted accounting principles that reflect the fully
40 allocated cost of providing the communications service, including all
41 direct and indirect costs. The indirect costs shall include amounts for
42 rights-of-way, franchise, consent, or administrative fees, regulatory
43 fees, occupation taxes, pole attachment fees, and ad valorem taxes.
44 The annual accounting shall reflect any direct or indirect subsidies

1 received by the local government owned communications service
2 provider, and any buildings, equipment, vehicles, and personnel that
3 are jointly used with other local government departments shall be fully
4 allocated to the local government owned communications service. The
5 Utilities Commission shall adopt rules and regulations to ensure
6 compliance with the provisions of this subdivision, and all records
7 demonstrating compliance shall be filed with the Utilities Commission
8 and made available for public inspection and copying.

9 **"§ 160A-329.5. Liability insurance rates.**

10 To ensure that local government owned communications service providers and
11 private communications service providers are, to the extent possible, able to compete
12 equally and fairly in the marketplace, the Department of Insurance shall determine the
13 State average market rate for private liability insurance for communications providers,
14 and the rate paid for liability insurance by local government owned communications
15 providers shall be equal to or greater than that rate. If a local government owned
16 communications service provider pays less than the average market rate for liability
17 insurance as established by the Department of Insurance, the local government owned
18 communications provider shall remit the difference to the general fund of the local
19 government that owns the communications provider.

20 **"§ 160A-329.6. Antitrust immunity.**

21 Any laws granting immunity to a political subdivision of the State for a violation of
22 the State's antitrust laws shall not apply to any action of a local government as it relates
23 to the provision of communications services under this Part, except as may be required
24 by the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36, or other federal
25 law."

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

28 "l. The term "public utility" shall include any municipality
29 providing service as defined in G.S. 62-3(23)a.6, and subject to
30 regulation under Part 1A of Article 16 of Chapter 160A of the
31 General Statutes."

32 **SECTION 3.** Any municipality that is currently designated as a public utility
33 under Chapter 62 of the General Statutes shall not be subject to the provisions of this act
34 with respect to any of its operations that are authorized by that Chapter.

35 **SECTION 4.** If any provision of this act or the application thereof to any
36 person or circumstance is held invalid, the invalidity shall not affect other provisions or
37 applications of this act which can be given effect without the invalid provision or
38 application, and to that end the provisions of this act are declared to be severable.

39 **SECTION 5.** This act is effective when it becomes law and applies to the
40 provision of communications services by a local government owned communications
41 services provider after that date.