

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

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HOUSE BILL 1587
Committee Substitute Favorable 6/7/07

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

Sponsors:

Referred to:

April 19, 2007

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

4 The General Assembly of North Carolina enacts:

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

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

8 "**§ 160A-329. Definitions.**

9 The following definitions apply in this Part:

- 10 (1) Local government. – A city as defined in G.S. 160A-1(2).
- 11 (2) Local government owned communications service provider. – A local
12 government which operates a public enterprise under G.S. 106A-311
13 that provides communications services to the public for a fee over a
14 facility, operation, or system that is directly or indirectly owned or
15 operated by or provides a financial benefit to the local government or
16 another local government.
- 17 (3) Communications network. – A wired or wireless network for the
18 provision of communications service.
- 19 (4) Communications service. – The provision of any of the following
20 services to the public or any sector of the public: (i) cable service, as
21 defined in G.S. 66-350(1); (ii) the conveyance or transmittal of
22 messages or communications by telephone or telegraph while
23 operating as a public utility, as defined in Chapter 62 of the General
24 Statutes; (iii) the electronic transmission, conveyance, or routing of
25 voice, data, audio, video, or any other information or signals to a point,
26 or between or among points, including transmission, conveyance, or
27 routing in which a computer processing application is used to act on
28 the form, code, or protocol of the content for purposes of the
29 transmission, conveyance, or routing, without regard to whether the

1 service is referred to as Voice-over-Internet Protocol or is classified by
2 the Federal Communications Commission as enhanced or value-added;
3 and (iv) Internet access service.

4 **"§ 160A-329.1. Authority of local governments unaffected.**

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

14 **"§ 160A-329.2. Public hearing.**

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

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

- 26 (1) Whether the proposed communications service is currently being
27 offered in the area considered for service and, if that is the case,
28 whether the communications service is generally available throughout
29 the area considered for service.
- 30 (2) If the same or similar communications service is not currently being
31 offered, whether any other service provider proposes to offer the same
32 or similar communications service.
- 33 (3) The capital investment required by the local government to provide the
34 communications service through a local government-owned
35 communications service provider, the cost associated with the
36 proposed method of financing and the estimated revenues and
37 expenses of providing and operating the communications service and
38 network. In allocating the expenses of providing and operating the
39 communications service and network, expenses associated with
40 buildings, equipment, vehicles, personnel, and other assets that are
41 jointly used by the local government-owned communications service
42 provider and other local government departments shall be allocated to
43 the local government-owned communications service provider using a
44 fully allocated cost accounting method.

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 within a
17 specified period of time after the communications service is first
18 provided, such time to be consistent with commercial practices for
19 similar projects.

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

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

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

25 **§ 160A-329.3. Bond authority.**

26 (a) A local government may issue one or more bonds as provided by Chapter 159
27 of the General Statutes or any other provision of general or local law to finance the
28 capital costs for facilities necessary to provide communications service to the public
29 through a local government-owned communications service provider. A bond issued
30 pursuant to this section shall be secured and paid for from the revenues generated by the
31 local government-owned communications service provider and assets that are used
32 exclusively in provision of the communications service. A local government may not
33 pay the origination, financing, or other carrying costs associated with bonds issued
34 under this section from the local government's general fund or public enterprise funds
35 nor secure the payment of any bond or other obligation incurred in providing
36 communications services with assets that are not used exclusively in providing
37 communications service .

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

41 **§ 160A-329.4. General operating limitations.**

42 Notwithstanding any other provision of law, a local government-owned
43 communications service provider:

- 1 (1) Shall comply with all local, State, and federal laws, regulations, or
2 other requirements that apply to the provision of communications by a
3 private communications service provider, including regulation by the
4 North Carolina Utilities Commission to the extent that the local
5 government-owned communications service provider is acting as a
6 public utility and regulation under Article 42 of Chapter 66 of the
7 General Statutes to the extent that the local government-owned
8 communications service provider is providing cable service.
- 9 (2) Shall not subsidize the cost of providing communications service with
10 funds from any other noncommunications service, operation, or other
11 revenue source, including any funds or revenue generated from
12 electric, gas, water, sewage, or garbage services. In complying with
13 this requirement, a local government-owned communications service
14 provider shall not price any communications service below the cost of
15 providing the service. If a determination is made that a direct or
16 indirect subsidy has been made, the local government-owned
17 communications service provider shall immediately increase prices for
18 the communications service in a manner that ensures that the subsidy
19 shall not continue, and any amounts used directly or indirectly to
20 subsidize the past operations shall be reimbursed to the local
21 government's general fund.
- 22 (3) Shall not, directly or indirectly, under the powers of a local
23 government, exercise the power of eminent domain to condemn any
24 plant, equipment, or real property owned by a private communications
25 service provider for the purpose of providing communications service.
- 26 (4) Shall not, directly or indirectly, under the powers of a local
27 government, exercise power or authority in any area, including zoning
28 or land-use regulation, to require any person, including residents of a
29 particular development, to use or subscribe to any communications
30 service provided by the local government-owned communications
31 service provider.
- 32 (5) Shall, in calculating the cost incurred and in the rates to be charged for
33 the provision of communications services, impute: (i) the cost of the
34 capital component that is the equivalent to the cost of capital available
35 to private communications service providers in the same locality; and
36 (ii) an amount equal to all taxes, including property taxes, licenses,
37 fees, and other assessments that would apply to a private
38 communications service provider including federal, State, and local
39 taxes; rights-of-way, franchise, consent, or administrative fees; and
40 pole attachment fees.
- 41 (6) Shall annually remit to the general fund of the local government
42 owning or having an economic interest in the communications service
43 provider an amount equivalent to all taxes or fees a private
44 communications service provider would be required to pay the local

1 government or county in which the local government is located,
2 including any applicable tax refunds received by the local government-
3 owned communications service provider because of its local
4 government status. The amount remitted to the local government's
5 general fund shall include a sum equal to the amount of property tax
6 that would have been due if the local government-owned
7 communications service provider were a private communications
8 service provider.

9 (7) Shall provide nondiscriminatory access to private communications
10 service providers on a first-come, first-served basis to rights-of-way,
11 poles, conduits, or other permanent distribution facilities owned,
12 leased, or operated by the local government unless the facilities have
13 insufficient capacity for the access and additional capacity cannot
14 reasonably be added to the facilities. For purposes of this subdivision,
15 the term "nondiscriminatory access" means that, at a minimum, access
16 shall be granted on the same terms and conditions as that given to a
17 local government-owned communications service provider and at rates
18 that do not exceed the rates prescribed for attachments by cable service
19 providers providing cable service as provided in 47 U.S.C. § 224(e) of
20 the Communications Act of 1934, as amended, and in 47 C.F.R. §
21 1.1409(e)(1).

22 (8) Shall keep separate books and shall separately account for revenues,
23 expenses, property, and source of investment dollars associated with
24 the provision of communications service.

25 (9) Shall prepare and publish an independent annual audit in accordance
26 with generally accepted accounting principles that reflect the fully
27 allocated cost of providing the communications service, including all
28 direct and indirect costs. The indirect costs shall include amounts for
29 rights-of-way, franchise, consent, or administrative fees, regulatory
30 fees, occupation taxes, pole attachment fees, and ad valorem taxes.
31 The annual accounting shall reflect any direct or indirect subsidies
32 received by the local government-owned communications service
33 provider, and any buildings, equipment, vehicles, and personnel that
34 are jointly used with other local government departments shall be fully
35 allocated to the local government-owned communications service. The
36 Utilities Commission shall adopt rules and regulations to ensure
37 compliance with the provisions of this subdivision, and all records
38 demonstrating compliance shall be filed with the Utilities Commission
39 and made available for public inspection and copying.

40 **"§ 160A-329.5. Liability insurance rates.**

41 To ensure that local government-owned communications service providers and
42 private communications service providers are, to the extent possible, able to compete
43 equally and fairly in the marketplace, the Department of Insurance shall determine the
44 State average market rate for private liability insurance for communications providers,

1 and the rate paid for liability insurance by local government-owned communications
2 providers shall be equal to or greater than that rate. If a local government-owned
3 communications service provider pays less than the average market rate for liability
4 insurance as established by the Department of Insurance, the local government-owned
5 communications provider shall remit the difference to the general fund of the local
6 government that owns the communications provider.

7 **"§ 160A-329.6. Injunctive Relief.**

8 The provisions of this Part may be enforced by any party aggrieved by the actions of
9 a local government communications provider by bringing an action for injunctive relief
10 in the superior court in the county in which the local government communications
11 provider is located."

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

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

18 **SECTION 3.** Any municipality that is designated as a public utility as of the
19 effective date of this act under Chapter 62 of the General Statutes shall not be subject to
20 the provisions of this act with respect to any of its operations that are authorized by that
21 Chapter.

22 **SECTION 4.** The public hearing and referendum requirements of
23 G.S. 160A-329.2, as enacted by this act, shall not apply to communications services
24 duly authorized by local government action on or before May 1, 2007, and in fact
25 offered to the public on or before November 1, 2007, by the local government-owned
26 communications service provider. The bond restrictions in G.S. 160A-329.3, as enacted
27 by this act, shall not apply to any bond intended to finance the capital costs for facilities
28 necessary to provide communications services which have been issued and are
29 outstanding, or are under a binding written commitment to be issued, as of the date this
30 act becomes effective. The definitions set forth in G.S. 160A-329, as enacted by this
31 act, shall apply to this section.

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

36 **SECTION 6.** This act is effective when it becomes law and applies to the
37 provision of communications services by a local government-owned communications
38 services provider after that date.