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HOUSE BILL 129*
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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



1 public, or any sector of the public, for a fee, regardless of the technology
2 used to deliver the service. The terms "cable service," "telecommunications
3 service," and "video programming service" have the same meanings as in
4 G.S. 105-164.3. The following is not considered the provision of
5 communications service:

- 6 a. The sharing of data or voice between governmental entities for
7 internal governmental purposes.
8 b. The remote reading or polling of data from utility or parking meters,
9 or the provisioning of energy demand reduction or smart grid
10 services for an electric, water, or sewer system.
11 c. The provision of free services to the public or a subset thereof.
12 (4) High-speed Internet access service. – Internet access service with
13 transmission speeds that are equal to or greater than the requirements for
14 basic broadband tier 1 service as defined by the Federal Communications
15 Commission for broadband data gathering and reporting.
16 (5) Interlocal agreement. – An agreement between units of local government as
17 authorized by Part 1 of Article 20 of Chapter 160A of the General Statutes.
18 (6) Joint agency. – A joint agency created under Part 1 of Article 20 of Chapter
19 160A of the General Statutes.

20 **§ 160A-340.1. City-owned communications service provider requirements.**

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

- 23 (1) Comply in its provision of communications service with all local, State, and
24 federal laws, regulations, or other requirements applicable to the provision of
25 the communications service if provided by a private communications service
26 provider.
27 (2) In accordance with the provisions of Chapter 159 of the General Statutes, the
28 Local Government Finance Act, establish one or more separate enterprise
29 funds for the provision of communications service, use the enterprise funds
30 to separately account for revenues, expenses, property, and source of
31 investment dollars associated with the provision of communications service,
32 and prepare and publish an independent annual report and audit in
33 accordance with generally accepted accounting principles that reflect the
34 fully allocated cost of providing the communications service, including all
35 direct and indirect costs. An annual independent audit conducted under
36 G.S. 159-34 and submitted to the Local Government Commission satisfies
37 the audit requirement of this subdivision.
38 (3) Limit the provision of communications service to within the corporate limits
39 of the city providing the communications service.
40 (4) Shall not, directly or indirectly, under the powers of a city, exercise power or
41 authority in any area, including zoning or land-use regulation, or exercise
42 power to withhold or delay the provision of monopoly utility service, to
43 require any person, including residents of a particular development, to use or
44 subscribe to any communications service provided by the city-owned
45 communications service provider.
46 (5) Shall provide nondiscriminatory access to private communications service
47 providers on a first-come, first-served basis to rights-of-way, poles, or
48 conduits owned, leased, or operated by the city unless the facilities have
49 insufficient capacity for the access and additional capacity cannot reasonably
50 be added to the facilities. For purposes of this subdivision, the term
51 "nondiscriminatory access" means that, at a minimum, access shall be

1 granted on the same terms and conditions as that given to a city-owned
2 communications service provider.

3 (6) Shall not air advertisements or other promotions for the city-owned
4 communications service on a public, educational, or governmental access
5 channel if the city requires another communications service provider to carry
6 the channel. The city shall not use city resources that are not allocated for
7 cost accounting purposes to the city-owned communications service to
8 promote city-owned communications service in comparison to private
9 services or, directly or indirectly, require city employees, officers, or
10 contractors to purchase city services.

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

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

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

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

41 **"§ 160A-340.2. Exemptions.**

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

49 (b) The provisions of G.S. 160A-340.1, 160A-340.4, and 160A-340.5 do not apply to
50 the provision of communications service in an unserved area. A city seeking to provide
51 communications service in an unserved area shall petition the North Carolina Utilities

1 Commission for a determination that an area is unserved. The petition shall identify with
2 specificity the geographic area for which the designation is sought. Any private
3 communications service provider, or any other interested party, may, within a time established
4 by order of the Commission, which time shall be no fewer than 30 days, file with the
5 Commission an objection to the designation on the grounds that one or more areas designated
6 in the petition is not an unserved area or that the city is not otherwise eligible to provide the
7 service. For purposes of this subsection, the term "unserved area" means a census block, as
8 designated by the most recent census of the U.S. Census Bureau, in which at least fifty percent
9 (50%) of households either have no access to high-speed Internet service or have access to
10 high-speed Internet service only from a satellite provider. A city may petition the Commission
11 to serve multiple contiguous unserved areas in the same proceeding.

12 (c) The provisions of G.S. 160A-340.1, 160A-340.3, 160A-340.4, 160A-340.5, and
13 160A-340.6 do not apply to a city or joint agency providing communications service as of
14 January 1, 2011, provided the city or joint agency limits the provision of communications
15 service to any one or more of the following:

16 (1) Persons within the corporate limits of the city providing the communications
17 service. For the purposes of this subsection, corporate limits shall mean the
18 corporate limits of the city as of April 1, 2011, or as expanded through
19 annexation.

20 (2) Existing customers of the communications service as of April 1, 2011.
21 Service to a customer outside the service area of the city or joint agency who
22 is also a public entity must comply with the open bidding procedures of
23 G.S. 143-129.8 upon the expiration or termination of the existing service
24 contract.

25 (3) The following service areas:

26 a. For the joint agency operated by the cities of Davidson and
27 Mooresville, the service area is the combined areas of the city of
28 Cornelius; the town of Troutman; the town of Huntersville; the
29 unincorporated areas of Mecklenburg County north of a line
30 beginning at Highway 16 along the west boundary of the county,
31 extending eastward along Highway 16, continuing east along
32 Interstate 485, and continuing eastward to the eastern boundary of
33 the county along Eastfield Road; and the unincorporated areas of
34 Iredell County south of Interstate 40, excluding Statesville and the
35 extraterritorial jurisdiction of Statesville.

36 b. For the city of Salisbury, the service area is the municipalities of
37 Salisbury, Spencer, East Spencer, Granite Quarry, Rockwell, Faith,
38 Cleveland, China Grove, Landis and the corridors between those
39 cities. The service area also includes the economic development
40 sites, public safety facilities, governmental facilities, and educational
41 schools and colleges located outside the municipalities and the
42 corridors between the municipalities and these sites, facilities,
43 schools, and colleges. The corridors between Salisbury and these
44 municipalities and these sites, facilities, schools, and colleges
45 includes only the area necessary to provide service to these
46 municipalities and these sites, facilities, schools, and colleges and
47 shall not be wider than 300 feet. The elected bodies of Spencer, East
48 Spencer, Granite Quarry, Rockwell, Faith, Cleveland, China Grove,
49 and Landis shall vote to approve the service extension into each
50 respective municipality before Salisbury can provide service to that
51 municipality. The Rowan County Board of County Commissioners

1 shall vote to approve service extension to any governmental
2 economic development site, governmental facility, school, or college
3 owned by Rowan County. The Rowan Salisbury School Board shall
4 also vote to approve service extension to schools.

5 c. For the city of Wilson, the service area is the county limits of Wilson
6 County, including the incorporated areas within the County.

7 d. For all other cities or joint agencies offering communications service,
8 the service area is the area designated in the map filed as part of the
9 initial notice of franchise with the Secretary of State as of January 1,
10 2011.

11 (d) The exemptions provided in this section do not exempt a city or joint agency from
12 laws and rules of general applicability to governmental services, including nondiscriminatory
13 obligations.

14 (e) In the event a city subject to the exemption set forth in subsection (c) of this section
15 provides communications service to a customer outside the limits set forth in that subsection,
16 the city shall have 30 days from the date of notice or discovery to cease providing service to the
17 customer without loss of the exemption.

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
37 into 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 may provide communications service. If a majority of the votes cast in the special election are
45 for the city providing communications service, the city may incur the debt for the service. If a
46 majority of the votes cast in the special election are against the city providing communications
47 service, the city shall not incur the debt. However, nothing in this section shall prohibit a city
48 from revising its plan to offer communications service and calling another special election on
49 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 service provider must provide information requested by the Secretary of Revenue necessary for calculation of the assessment. The Department must inform each city-owned communications service 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 specify 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 (d) 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 service 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 within 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 service.

32 (g) All proposals shall be sealed and shall be opened in public. Provided, that trade
33 secrets shall remain confidential as provided under G.S. 132-1.2."

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

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

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

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

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

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

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

51 "Article 9A.

1 "Borrowing by Cities for Competitive Purposes.

2 **"§ 159-175.10. Additional requirements for review of city financing application;**
3 **communications service.**

4 The Commission shall apply additional requirements to an application for financing by a
5 city or a joint agency under Part 1 of Article 20 of Chapter 160A of the General Statutes for the
6 construction, operation, expansion, or repair of a communications system or other infrastructure
7 for the purpose of offering communications service, as that term is defined in
8 G.S. 160A-340(2), that is or will be competitive with communications service offered by a
9 private communications service provider. This section does not apply to the repair, rebuilding,
10 replacement, or improvement of an existing communications network, or equipment relating
11 thereto, but does apply to the expansion of such existing network. The additional requirements
12 are the following:

13 (1) Prior to submitting an application to the Commission, a city or joint agency
14 shall comply with the provisions of G.S. 160A-340.3 requiring at least two
15 public hearings on the proposed communications service project and notice
16 of the hearings to private communications service providers who have
17 requested notice.

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

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

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

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

38 **SECTION 4.** G.S. 159-81(3) is amended by adding a new sub-subdivision to read:

39 "q. Cable television systems."

40 **SECTION 5.** Sections 2, 3, and 4 of this act do not apply to a city or joint agency
41 providing communications service as of January 1, 2011, provided the city or joint agency
42 limits the provision of communications service as provided in G.S. 160A-340.2(c). In the event
43 a city subject to the exemption set forth in this section provides communications service to a
44 customer outside the limits set forth in G.S. 160A-340(c), the city shall have 30 days from the
45 date of notice or discovery to cease providing service to the customer without loss of the
46 exemption.

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

50 **SECTION 7.** If any provision of this act or the application thereof to any person or
51 circumstance is held invalid, the invalidity shall not affect other provisions or applications of

1 this act which can be given effect without the invalid provision or application, and to that end
2 the provisions of this act are declared to be severable.

3 **SECTION 8.** Except as otherwise provided, this act is effective when it becomes
4 law and applies to the provision of communications service by a city or joint agency under Part
5 1 of Article 20 of Chapter 160A of the General Statutes on and after that date.