

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

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HOUSE BILL 1587
PROPOSED COMMITTEE SUBSTITUTE H1587-PCS50698-TD-16

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

(Public)

Sponsors:

Referred to:

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

General Assembly of North Carolina**Session 2007**

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.

"§ 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.

"§ 160A-329.2. Public hearing.

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 cost associated with the
37 proposed method of financing and the estimated revenues and
38 expenses of providing and operating the communications service and
39 network. In allocating the expenses of providing and operating the
40 communications service and network, expenses associated with
41 buildings, equipment, vehicles, personnel, and other assets that are
42 jointly used by the local government-owned communications service
43 provider and other local government departments shall be allocated to

General Assembly of North CarolinaSession 2007

1 the local government-owned communications service provider using a
2 fully allocated cost accounting method.

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

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

- 13 (1) The projected number of users to be served by the local government-
14 owned communications service provider.
15 (2) The geographical area to be served by the local government-owned
16 communications service provider.
17 (3) The types of communications service to be provided.
18 (4) A plan to ensure that revenues exceed operating expenses within a
19 specified period of time after the communications service is first
20 provided, such time to be consistent with commercial practices for
21 similar projects.
22 (5) The estimated capital and operational costs and revenues for the first
23 four years that communications service is provided.
24 (6) The projected network modernization and technological upgrade plans,
25 including estimated costs.
26 (7) The projected schedule for offering the communications service.

27 **"§ 160A-329.3. Bond authority.**

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

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

43 **"§ 160A-329.4. General operating limitations.**

General Assembly of North CarolinaSession 2007

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

3 (1) Shall comply with all local, State, and federal laws, regulations, or
4 other requirements that apply to the provision of communications by a
5 private communications service provider, including regulation by the
6 North Carolina Utilities Commission to the extent that the local
7 government-owned communications service provider is acting as a
8 public utility and regulation under Article 42 of Chapter 66 of the
9 General Statutes to the extent that the local government-owned
10 communications service provider is providing cable service.

11 (2) Shall not subsidize the cost of providing communications service with
12 funds from any other noncommunications service, operation, or other
13 revenue source, including any funds or revenue generated from
14 electric, gas, water, sewage, or garbage services. In complying with
15 this requirement, a local government-owned communications service
16 provider shall not price any communications service below the cost of
17 providing the service. If a determination is made that a direct or
18 indirect subsidy has been made, the local government-owned
19 communications service provider shall immediately increase prices for
20 the communications service in a manner that ensures that the subsidy
21 shall not continue, and any amounts used directly or indirectly to
22 subsidize the past operations shall be reimbursed to the local
23 government's general fund.

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

28 (4) Shall not, directly or indirectly, under the powers of a local
29 government, exercise power or authority in any area, including zoning
30 or land-use regulation, to require any person, including residents of a
31 particular development, to use or subscribe to any communications
32 service provided by the local government-owned communications
33 service provider.

34 (5) Shall, in calculating the cost incurred and in the rates to be charged for
35 the provision of communications services, impute: (i) the cost of the
36 capital component that is the equivalent to the cost of capital available
37 to private communications service providers in the same locality; and
38 (ii) an amount equal to all taxes, including property taxes, licenses,
39 fees, and other assessments that would apply to a private
40 communications service provider including federal, State, and local
41 taxes; rights-of-way, franchise, consent, or administrative fees; and
42 pole attachment fees.

43 (6) Shall annually remit to the general fund of the local government
44 owning or having an economic interest in the communications service

General Assembly of North Carolina

Session 2007

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

11 (7) Shall provide nondiscriminatory access to private communications
12 service providers on a first-come, first-served basis to rights-of-way,
13 poles, conduits, or other permanent distribution facilities owned,
14 leased, or operated by the local government unless the facilities have
15 insufficient capacity for the access and additional capacity cannot
16 reasonably be added to the facilities. For purposes of this subdivision,
17 the term "nondiscriminatory access" means that, at a minimum, access
18 shall be granted on the same terms and conditions as that given to a
19 local government-owned communications service provider and at rates
20 that do not exceed the rates prescribed for attachments by cable service
21 providers providing cable service as provided in 47 U.S.C. § 224(e) of
22 the Communications Act of 1934, as amended, and in 47 C.F.R. §
23 1.1409(e)(1).

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

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

42 **§ 160A-329.5. Liability insurance rates.**

43 To ensure that local government-owned communications service providers and
44 private communications service providers are, to the extent possible, able to compete

General Assembly of North Carolina**Session 2007**

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

9 **"§ 160A-329.6. Injunctive Relief.**

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

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

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

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

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

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

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