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FISCAL IMPACT REPORT

	ORIGINAL DATE	03/07/09	
SPONSOR <u>SJC</u>	LAST UPDATED	03/15/09	HB _____
			445/SJCS/SFL#1/
SHORT TITLE <u>PRC Regulation of Certain Telecomm Rates</u>			SB <u>SFL#2</u>
			ANALYST <u>Lucero</u>

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY09	FY10	FY11		
	Indeterminate	Indeterminate	Recurring	Telecommunications Fund
	Indeterminate	Indeterminate	Recurring	General Fund

(Parenthesis () Indicate Revenue Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Public Regulation Commission (PRC)

Attorney General's Office (AGO)

SUMMARY

Synopsis of SFL #1 Amendment

Senate Floor Amendment #2 to SJC Substitute for Senate Bill 445 adds a new subsection to require the PRC to report annually to the governor and Legislature on the status of the deregulation of the telecommunications services in Section 1 of the SJC substitute for SB 445.

Synopsis of SFL #1 Amendment

Senate Floor Amendment #1 to SJC Substitute for Senate Bill 445 adds to that section of bill that removes all retail rate regulation from the Public Regulation Commission (PRC) effective July 1, 2009, except for single line flat rated residential ("1FR") and business (1FB") local phone service. The amendment adds to the exemption "public telecommunications services to or from inmates of any type of correctional facility or jail provided pursuant to a contract with the correction facility or jail"

The amendment also clarifies that upon election by a telecommunications company, after July 1, 2012, the PRC shall not regulate retail rates for all business local exchange service unless PRC during the first six calendar months of 2012 extends its regulatory jurisdiction.

Synopsis of Original Bill

Senate Judiciary Committee (SJC) Substitute for Senate Bill 445 proposes to amend section 63-9A-8 NMSA 1978 of the New Mexico Telecommunications Act. The bill makes substantial changes to effective competition provisions of the Act. The bill removes all retail rate regulation from the Public Regulation Commission (PRC) effective July 1, 2009, upon election by a regulated telecommunications company, except for single line flat rated residential (“1FR”) and business (1FB”) local phone service.

The bill allows a service provider to be released from the rate requirements. It does not affect existing obligations related to previous settlement agreements. The bill removes customer credits or refunds for violation of service quality metrics. The bill defines “designed services” and “discretionary services” that are to be exempt from rate regulation.

The bill expressly includes a mid-size carrier as eligible for deregulation. Under the bill, the PRC retains jurisdiction over all forms of regulatory jurisdiction within the current authority of commission except, upon election by a telecommunications company, the regulation of retail rates for business and residential local exchange services, interexchange services, private line services, designated services or discretionary services provided throughout the state.

Beginning July 1, 2012, the basic residential and business line local exchange service rates would be deregulated unless the PRC, during the first six calendar months of 2012, extends its retail rate jurisdiction and may orders an extension of up to two more years, on a finding supported by substantial evidence that such action is necessary to protect the public interest.

The bill further provides that for electing companies that offer both 1FR and 1FB services on a stand-alone basis, the PRC’s rate regulation shall not extend to packages or bundles of services that include 1FR or 1FB services.

The bill also adds a provision that basic residential and business service rates will be identical statewide, and another provision that detariffed prices, terms and conditions of services shall be made available on the company’s web site.

An electing company that has elected to be deregulated would still be subject to PRC rules for service quality, but instead of paying customer credits for failing to meet those standards, as is presently the case, the company would have to submit a plan to remedy the failure, and be subject to the limited administrative fining authority pursuant to Section 63-7-23 NMSA 1978.

Finally, the Substitute proposes a “sunset” provision, repealing all of the changes made by this bill and reinstating the section on effective competition, as that section has been amended by the first part of this bill, effective July 1, 2013.

FISCAL IMPLICATIONS

It is possible that the deregulated rates of at least some electing companies may increase substantially from existing regulated rates which may impact consumers; conversely, the rates could decrease. In Ohio rates increased after deregulation, in Nebraska little changes, other states that that passed similar legislation include Idaho, Iowa, and Indiana.

The PRC may have a minimal administrative impact due to the annual reporting requirement. Additionally, the PRC may be have an impact in 2012 (refer to administrative implications).

Although the bill would continue rate regulation of 1FR and 1FB rates until at least 2012, electing companies can deregulate the rates for services before that date simply by offering those services along with other services. Because the bill does not define “other services”, it appears that those other services can be any service, such as credit card services.

The growing use of wireless and Voice over Internet Protocol (VoIP) can cause concern for cities and states regarding a shift of the tax base. The Telecommunications Act of 1996 addressed this change and, as use of traditional landlines has decreased and use of wireless technology increased, there exists a possible tax base shift from local and state tax bases to federal. At this time, it is uncertain whether VoIP is more prevalent in urban areas.

As more customers shift to VoIP or wireless services, the New Mexico telecommunications fund may receive less revenue. The telecommunications fund, deposits excess revenue to the general fund. Therefore, there is a potential impact to general fund revenues which are not quantifiable or indeterminate at this time.

Although the primary focus of the bill is on basic service, its effect on designed services, those purchased by large commercial customers and internet service providers, is difficult to quantify. Those rates are not set by the Commission currently, but they are subject to the filed rate doctrine as it applies to tariffed services.

The bill provides for a “sunset;” however, many of the changes would survive after the Section 2 “sunset” provisions contained in the bill.

SIGNIFICANT ISSUES

According to the Attorney General’s Office (AGO):

Passage of this bill would conflict with existing statutory law. NMSA 63-7.1.1-Enabling statute of the PRC that gives it the power and duty to issue certificates of public convenience and necessity and to determine, supervise, regulate and control all rates and charges of telephone companies. Allowing Qwest to unilaterally “opt-out” of regulation would violate this provision of law. Other statutes in conflict with this legislation are:

1. NMSA 63-9A-2-Purpose of the NM Telecom Act to permit a regulatory framework that will allow an orderly transition from a regulated industry to a competitive market environment.
2. NMSA 63-9A-8.1-Presumes a hearing and notice to relevant party and states that the burden of proof is on the telecommunications company to show that the increased rate or charge is just and reasonable.
3. NMSA 63-9A-8.2-Requires the PRC to implement an alternative form of regulation that includes reasonable price caps for basic residence and business local exchange services and requires the commission by rule, to establish consumer protection and quality of service standards.

According to the PRC, under this bill, when determining whether a telecommunications service is subject to effective competition, the Commission is directed to consider whether:

1. A comparable service or facility is available from a supplier other than an incumbent telecommunications company in the relevant market area being considered by the PRC; and
2. Market forces are sufficient to assure just and reasonable rates without regulation.

Current law allows a telecommunications company to make a factual showing at the PRC of “effective competition” as a prerequisite for reduced regulation in certain areas of the state. The criteria set out in this bill for the PRC to use in determining “effective competition” removes the PRC processes, expertise and judgment and its ability to assess, by service and geographic area, whether there is a degree of competition that rises to the level of “effective” and to protect consumers from inaccurate bills or arbitrary cutoffs. It should be noted that Qwest has never attempted to create the factual showing necessary for effective competition under existing law.

This bill impedes the PRC’s ability to manage a “transition” from regulation to competition as set out in the purpose of the NM Telecom Act. It would also hinder the Commission’s ability to identify and correct any anti-competitive behavior, and creates significant risk that rural areas of the state will lag further behind in obtaining access to broadband communications.

In considering whether market forces exist in the relevant market area, the PRC is further directed to consider, at a minimum, whether wireless, cable or VoIP services are or are not available in the market. By contrast, the existing provisions of law provide that the PRC should consider the extent to which *services* are reasonably available from alternative providers in the relevant market area, the *ability* of the alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms and conditions and any existing economic or regulatory barriers.

By providing that the PRC must examine whether comparable services from other providers *are* available in the relevant market area, rather than whether such comparable services *can* be made available as provided under existing law, the bill makes at least one prong of the test of whether effective competition exists more objective.

With regard to the provisions of the bill regarding the ability of telecommunications companies to become electing companies, the bill does not require any finding regarding the existence of effective competition before the rates of those companies become deregulated. Only basic identifying information--no showing of proof or necessity is required. Once an “election” is filed, all rates would be deregulated except for “single line flat rated residential and business local exchange services.”

Unless effective competition exists, it is possible that the deregulated rates of at least some electing companies may increase substantially from existing regulated rates. Additionally, although the bill would continue rate regulation of 1FR and 1FB rates until at least 2012, electing companies can deregulate the rates for services before that date simply by offering those services along with other services – packages or bundles. Because the bill does not define “other services”, it appears that those other services can be any service, such as credit card services.

Because electing companies can largely deregulate their telecommunications rates without having to show substantial evidence to show “effective competition” in their markets, it is unlikely that any telecommunications company would request the PRC to determine whether such competition exists.

A company that has elected to be deregulated would still be subject to PRC rules for service quality, but instead of paying customer credits for failing to meet those standards, as is presently the case, the company would have to submit a plan to remedy the failure, and be subject to the limited administrative fining authority pursuant to Section 63-7-23 NMSA 1978.

The sole settlement agreement that addresses noncompliance with previous alternative form of regulation (AFOR) plans - a settlement agreement that has been approved by the Commission - is a settlement with Qwest known as the Second Amended Settlement Agreement (SASA). The SASA obligates Qwest to make certain investments primarily in facilities, but does not address Qwest's rates. The SASA, which would not be affected by the bill, expires under its own terms on August 1, 2010.

Section 2 of the bill repeals section 1, effective July 1, 2013, then reinstates paragraphs A through E, as amended. This provides a "sunset" for any regulation by the PRC.

ADMINISTRATIVE IMPLICATIONS

The bill shifts the burden from a carrier demonstrating that its rates for basic residential and business lines are fair, just and reasonable, and requires the PRC to establish "by substantial evidence," that the deregulation of those rates would be contrary to the public interest. The PRC would continue to exercise jurisdiction in other areas, such as customer protection, service quality standards, and intercarrier disputes. For violations of service quality standards, instead of the credits established by current rule, the Commission could consider fines, after notice and hearing pursuant to Section 63-7-23.

The provisions of the bill that gives the PRC the authority to extend rate regulation of 1FR and 1FB services after July 1, 2012, will require the PRC to make that determination with respect to a number of telecommunications companies within a relatively short period of time – six months prior to the expiration of retail rate regulation. This may impact staff resources at that time (2012). However, quantification of that non-recurring impact cannot be made at this time but may be minimal to moderate and is dependent on the study needed to determine whether to extend regulation after 2012.

PERFORMANCE IMPLICATIONS

According to the PRC, the bill would require the PRC to re-evaluate its current AFOR and any extensions thereof, as well as to promulgate new rules on Quality of Service, since the bill may invalidate some of the current rules, especially with regard to credits to customers for aggregated violations of service quality requirements. This would eliminate disparity among telecommunications providers, while treating them more like other utilities who are subject to service quality rules.

TECHNICAL ISSUES

The bill removes all PRC jurisdiction over rates with the exception of "single line flat rated residential and business local exchange services." These terms refer only to the first line going to a home or business. However, the bill goes on to remove price regulation with respect to those services as well if they are part of a bundle or package of other, non-regulated services.

According to the PRC, the bill allows a company to elect to become exempt from the pricing provisions of any alternative form of regulation ("AFOR") after July 1, 2009. The pricing provisions of Qwest Corporation's ("Qwest") current AFOR expire December 31, 2009.

The "sunset" provision of the bill makes it unclear what form of regulation would be in place after July 1, 2013. The Commission may put into effect a new AFOR.

Subsection C of Section 63-9A-8 introduces the word “deregulated,” which is inconsistent with the existing, unchanged language that provides for “modification” of regulation.

The bill would eliminate the payment of customer credits that presently apply to customers experiencing service quality failure such as failure to provision service timely, held orders or interruption of service. Qwest Corporation (“Qwest”) is the only telecommunications provider that is presently obligated to pay customer credits for service quality failures. The bill, by eliminating Qwest’s obligation to pay customer credits and making Qwest instead liable to pay fines for such service quality failures, would put Qwest on the same footing as other telecommunications providers.

In 2005, Iowa approved House File 277 which deregulated a portion of telecommunication rates in that state. However, the bill included a provision for re-regulation by the Iowa Utilities Board, the equivalent of New Mexico’s PRC, if after notice and opportunity for hearing; it finds that one or more companies have market power in a particular market. The power to re-regulate the industry is a powerful tool to insure rates remain competitive, consumers have choice, and services are of a quality nature.

A question remains over whether sufficient competition exists. According to a report by the Attorney General’s Office shows that only 8 percent of New Mexicans are served by competitive local exchange carriers, smaller companies that compete with the established carrier (QWEST) to provide telephone and Internet services. The report recognizes that the causes of limited competition are diverse including limited service availability and affordability for cable phone services.

OTHER SUBSTANTIVE ISSUES

Preliminary results from a National Health Interview Survey (NHIS) shows increasing numbers of American homes have only wireless telephones. Additionally, homes with a telephone landline report all or almost all calls are received on wireless telephones.

CURRENT FEDERAL REGULATION

The passage of the federal Telecommunications Act of 1996 reflected a change in federal policy from legal monopoly to an emphasis on competition. The 1996 Act opened local exchange markets by requiring the incumbent local exchange carriers to open their networks to competitor companies. Competitors may access the network by purchasing services at wholesale rates for resale, leasing elements of the network on an unbundled basis at wholesale cost for resale, or interconnecting the competitor’s own facilities directly to the incumbent carrier’s network. This network access must also be provided without unreasonable or discriminatory conditions or limitations on the resale of telecommunications services. If the incumbent carrier cannot agree on terms with the competitor requesting access, the parties may request arbitration services from a state commission, such as the Public Regulation Commission.

AMENDMENTS

Perhaps the bill could be amended to deregulate telecommunication rates in larger, more urban areas of the state.

The PRC believes strongly that language be inserted in the bill to guarantee continued PRC jurisdiction over the rates and services of Inmate Operator Service Providers (“IOSP’s”).

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

PRC would continue to regulate telecommunication companies’ rates, and would continue to determine whether effective competition exists.

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