F I S C A L   I M P A C T   R E P O R T

SPONSOR: House Floor DATE TYPED: 3/19/03 HB 634/HFlS

SHORT TITLE: Telecommunication Company Grants of Access SB

ANALYST: Padilla

REVENUE

Estimated Revenue		Subsequent Years Impact	Recurring or Non-Rec	Fund Affected
FY03	**FY04**			
		($12,000.0)	Non-recurring	Rural Extension Fund

(Parenthesis ( ) Indicate Revenue Decreases)

Duplicates some provisions of HB 636 and SB 530

SOURCES OF INFORMATION
LFC Files

Responses Received From
Attorney General's Office
Public Regulation Commission
Office of Indian Affairs

SUMMARY

Synopsis of Bill

The House Floor Substitute for House Bill 634 does two distinct things, the first relating to rights-of-way and the second relating to Qwest's "Rural Extension Fund."

First, the bill adds a new section to the New Mexico Telecommunications Act relating to rights of way for telecommunications companies and establishing that a telecommunications company does not need to provide service in certain cases. The bill requires a telecommunications company to obtain all rights of way necessary to provide telephone service. However, it allows a company *not* to count any order for telephone service as a "held order" if the order requires that right of way must be obtained. It requires a telecommunications company to maintain a list of all orders not filled because of failure to obtain rights of way and to file the reports with the PRC.

Section 1.E permits a telecommunications company to refuse to provide service that has "limited demand" or involves a "large capital expenditure" if the service is "deemed to be not in the public interest or would place an undue burden on the general body of customers."

Section 1.F. prohibits the PRC from imposing fines, penalties or taking any adverse action against a telecommunications company for any delay in installing new service if the company could demonstrate that the delay is due to the inability of the company to obtain rights of way despite its good faith efforts. This section specifically mentions rights of way over Indian lands.

Second, the House Floor substitute to HB 634 adds a new subsection to the New Mexico Telecommunications Act to terminate rural extension funds. The bill would prevent the PRC from requiring a telecommunications company to establish or maintain a rural extension fund. The bill allows Qwest (the only company with a rural extension fund) to credit the $12,000.0 balance in its fund against its "telecommunications projects in rural areas." The bill prevents Qwest from counting these projects against its current investment commitments with the PRC as part of its Alternative Form of Regulation (AFOR). It also requires that the PRC agree to the projects.

Significant Issues

Rights-of-Way Issues

1. Held Orders: Unlike the original bill, the House Floor substitute places the burden of acquiring rights of way on telecommunications providers. However, the bill would change the definition of a "held order" based on access to rights of way. Held orders, in the cases of Qwest and Valor, have been negotiated in their Alternative Forms of Regulation (AFORs). Pursuant to their AFORs, Qwest and Valor are required to file applications for rights of way when an order is placed. According to its AFOR, Qwest, for example, may incur financial liability for "failure to obtain necessary right-of-way or permits, including those from sovereign tribal authorities…" The AFORs define certain standards for held orders. This bill, however, changes those standards.

The PRC emphasizes that the held order definition and standards in Qwest's AFOR were developed in two cases that were settled by the AFOR. One of these cases was upheld by the New Mexico Supreme Court. The PRC adds that the it can temporarily waive Qwest and Valor's obligation to provide service if they cannot obtain rights of way within 30 days. The PRC reports that Qwest has requested over 700 waivers over the course of its AFOR, only six of which have been denied.

2. Refusal to Furnish Service: Section 1.E, by allowing Qwest and Valor to refuse to provide phone service under certain conditions, conflicts with the companies' current obligations to provide service to customers as set forth in their AFORs and as established in their tariffs. The PRC points out that the issue of unreasonable or high cost (which, according to the bill, would be a reason not to provide service) was specifically addressed in Qwest's AFOR negotiations. The resulting agreement provided that orders within 1000 feet of an existing telecommunications pedestal that would cost $5,000 or more to connect are exempted from Qwest's obligation to serve.

The bill does not establish who will determine when a high-cost service is "deemed to be not in the public interest . . ." The PRC, in its analysis of the bill, assumes that the company itself can make this determination.

3. Indian Lands. The PRC and the Office of Indian Affairs believe one of the most significant effects of this bill will be on Native Americans. Section 1.F prevents the PRC from imposing penalties on a company for delays in the installation of service on Native American land if the company can show that it cannot obtain rights of way from a tribe or pueblo despite good faith efforts to do so. However, the PRC is concerned that this section of the bill, combined with Section 1.E, will excuse Qwest and Valor from good faith negotiations if they determine that the expense of obtaining right of way is too high or if the demand in an area is too limited.

The Office of Indian Affairs points out that federal law provides for the authorization of rights of way across Indian lands for telecommunications. Federal law also identifies the conditions under which certain interests in Indian land may be leased or permitted.

Rural Extension Fund Issues

1. The only carrier with a Rural Extension Fund is Qwest. The fund was created by the State Corporation Commission (now the New Mexico PRC) as a result of the Tax Reform Act of 1986. The Tax Reform Act lowered the tax expenses of the incumbent carriers; however, the SCC did not refund the "savings" to consumers of Mountain Bell (which is now Qwest). Instead it ordered Mountain Bell to deposit $2 million annually into a Rural Extension Fund. The Fund is currently used to subsidize the cost of providing primary line service to consumers who live more than 1,000 feet from the nearest pedestal or terminal. The cost of installing the line is the responsibility of the person requesting service. A qualifying consumer may be eligible for up to $5,000 from the Fund.

The Rural Extension Fund has a balance of approximately $12 million. The bill provides that after June 30, 2003, no telecommunication carrier will be required by the PRC to reserve, set aside, or accrue additional money to an existing rural extension fund. The AG's office notes that if there had never been a Fund, consumers would have paid, or would pay, less on their monthly telephone bill. Instead of paying less, every month a portion of every consumer's telephone payment was, and is, deposited into the fund. Therefore, the AG's office points out, the fund is held by Qwest, in trust, for the benefit of New Mexico consumers. The money in the Qwest Rural Extension Fund is not from *Qwest's* retained earnings, it is proceeds that belong to consumers that are simply being held, in trust, by Qwest.

2. The bill provides that the money in the Fund will be spent by the telecommunication company after consultation with the PRC. The AG's office suggests that it would be better public policy for the PRC to decide where, when and how the Fund should be spent after consultation by all interested parties, including Staff, consumer advocates and citizens in the rural areas of New Mexico.

FISCAL IMPLICATIONS

The fiscal impact of this bill will be the potential transfer of funds from the Rural Extension Fund, which currently has a balance of approximately $12,000.0, to Qwest for telecommunications development projects.

ADMINISTRATIVE IMPLICATIONS

The PRC believes this bill would remove PRC oversight of a telecommunications company's obligation to serve customers in a timely manner if right of way is an issue in the provisioning of the service.

The Office of Indian affairs believes one administrative implication may be jurisdictional issues relating to negotiating access to tribal lands.

RELATIONSHIP

SB 530 and HB 636 also contain provisions for the termination of the Rural Extension Fund.

LP/prr:yr