

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website (legis.state.nm.us). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

ORIGINAL DATE
SPONSOR Cisneros **LAST UPDATED** 02/03/11 **HB** _____

SHORT TITLE Remove Certain Telecomm Rates from PRC **SB** 4/aSCORC

ANALYST Wilson

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY10	FY11	FY12		
		(Indeterminate) See Fiscal Impacts	Recurring	Telecom Fund
		(Indeterminate) See Fiscal Impacts	Recurring	General Fund

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY10	FY11	FY12	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total			\$1.0-\$600.0		Recurring	General Fund, et al

(Parenthesis () Indicate Expenditure Decreases)

SB 4 relates to SB 122 and HB 17

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General (AGO)

Public Regulation Commission (PRC)

SUMMARY

Synopsis of SCORC Amendment

The Senate Corporations and Transportation Committee amendment to Senate Bill 4 expands the PRC oversight when determining if there is effective competition in the relevant market to rates for basic services, calling features and service packages that include basic services and calling features across the company's entire service area.

Synopsis of Original Bill

Senate Bill 4 makes revisions to Section 63-9A-8 NMSA 1978, the Telecommunications Act, concerning a finding of effective competition in public telecommunications service. Such a finding would result in the elimination of all regulatory requirements for all retail telecommunications services in a given petition for all telecommunications providers within a specified service area. The elimination of all regulatory requirements over retail telecommunications services would be predicated on a factual finding that effective competition exists in over 51% of the relevant market areas.

FISCAL IMPLICATIONS

The AGO states that in the absence of effective tariff or rate regulation it is likely that government costs will increase significantly. The State of New Mexico is the single largest customer of Qwest. As the *de facto* monopoly provider for many types of services in rural New Mexico, state agencies would not be able to rely on the market to provide effective price discipline. In these types of marketplaces, absent effective tariff or price regulation, prices for consumers tend to rise.

A case could be made if deregulation occurs, a telecom provider may not be required to continue to pay utility and carrier inspection fees to the PRC. It has been estimated that these fees contributed \$5,000,000 to the general fund.

In order to avoid the issue of fees, it might be helpful to amend Section 63-7-20 NMSA 1978 to clarify that under the provisions of this bill Qwest and Windstream will continue to pay the fees outlined in this section. The AGO suggests the following wording:

Nothing in this bill shall be construed as repealing or in any way modifying the provisions of NMSA 63-7-20 and 63-7-23.

SIGNIFICANT ISSUES

The PRC stated the following:

This bill provides that any elimination of regulatory requirements for an applicable service would apply to the defined service area for all providers of those services in that service territory. Those regulatory requirements would include oversight over rates, terms, conditions of service, consumer protection, service quality and investment rules and standards for those services throughout part or all of a provider's service territory. The relaxation of regulation may occur in areas where viable competition does not exist for those services subject to "effective competition". If the PRC makes a determination of effective competition is found for 51% of a carrier's access lines in a market area, then PRC may determine the entire service territory of the carrier is subject of the elimination of service regulation, even in rural areas where there may be no competitors. Also, it may result in patchwork regulation for many providers of those services whose service territories overlap the service area subject to effective competition.

The bill states the telecom provider must cover the cost of providing a service, but then shifts the burden of proof for proving a service is below cost to a challenging party. The telecom provider generally has the information on its costs.

There is no provision in the bill for a future review of the effect of the elimination of regulation on the competitiveness of the market if those services are determined to be subject to effective competition and services are deregulated.

The AGO states that the bill is vulnerable to legal challenge because:

- the factual predicates that would trigger the elimination of all regulatory requirements are ambiguous. For example if the PRC were to find that the Albuquerque market is effectively competitive, then a company's entire New Mexico operation shall be deregulated;
- the PRC's jurisdiction is eliminated under this mandatory language. Whatever legal authority the PRC currently possesses to order infrastructure investment would be eliminated with this bill;
- it posits that conditions in Cloudcroft, as an example, should be viewed as equivalent to the conditions in Albuquerque. However, Cloudcroft does not have the population density or demand for advanced network services that would create incentives for firms to set up business there;
- one net effect is to potentially enshrine one company, such as Qwest, as the *de facto* monopoly provider in New Mexico's smaller towns and cities with no recourse to a regulatory authority in the event of monopolistic abuse;
- the factual predicate that Qwest has lost 33% of its access lines in the past decade(according to an AGO study is problematic as well. There is legal argument that access line loss, in and of itself, is a meaningless number. Some investment analysts have found that phone companies experience a net benefit from the loss of access lines. For example operating expenses are reduced and aging outside infrastructure can be retired. Also balancing the access line loss is the huge increase in revenues that a company, such as Qwest, is experiencing due to the special access revenues it obtains from connecting cell towers to its central offices. Thus access line loss in and of itself is a meaningless measure of the extent to which effective competition exists;
- statements about access line loss, cited as a reason for enacting this bill, by themselves do little to inform about the supposed need for this legislation. Access line loss, in and of itself is a meaningless number.
- it would potentially eliminate all recourse that customers presently have in the case of billing disputes, service quality issues of other complaints of that nature; and
- it could potentially grant Qwest a *de facto* monopoly in much of its New Mexico service territory.
- while the bill does say that rates for "basic local exchange" service will remain the same, the fact is that this is a miniscule portion of Qwest's business. Retail T1, and other retail rates would no longer be subject to any PRC scrutiny.

A question remains over whether sufficient competition exists. A report by the AGO shows that only 8% 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.

ADMINISTRATIVE IMPLICATIONS

Proceedings pursuant to this bill require expedited treatment of a showing within 120 days. This could put a strain on PRC resources, as no such petitions have been considered in the past, so no precedent or regulatory structure currently exists.

If regulatory requirements are eliminated as specified in this bill, some portion of the regulatory workload would be eliminated. Consumer complaints for the specified services may increase but there will be no regulatory remedies for those complaints.

The bill only allows the PRC 60 days to review a determination of effective competition and its consistency with a carrier's alternative form of regulation, presumably to make changes. According to the PRC, this is a very truncated schedule and may put a strain on PRC resources.

RELATIONSHIP

SB 4 relates to SB 122, Competitive Telecomm Provider Contracts and HB 17, Telecomm Relocation Costs to Customers.

OTHER SUBSTANTIVE ISSUES

The AGO also provided the following:

This bill reverses a long established principle in Anglo-American jurisprudence by shifting the burden of proof, and by asking a proponent to prove a negative; to gain the relief sought. Existing law dictates that if a company, such as Qwest, offers a promotion, it has the burden of showing that the price of the promotion still meets the cost Qwest incurs to provide that service. This legislation would reverse that, meaning that a competitor would have to show that the promotion being offered does not cover Qwest's cost. This would be an impossible burden to meet, as Qwest considers most of its cost information proprietary and will not share that information. Also, legal scholars argue that it is logically impossible to prove a negative proposition. Thus, this bill is vulnerable to legal challenge because this burden shifting effectively vitiates PRC authority to prevent predatory pricing and other monopolistic market abuses.

Existing statutes already allow Qwest or Windstream to seek much of the regulatory relief sought here, while maintaining valuable PRC authority to tailor any finding to the particular realities of New Mexico's rural communities. This is the third time in as many years that this bill has been introduced.