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Senate Bill 528 (as introduced 5-24-05)
Sponsor: Senator Shirley Johnson
Committee: Technology and Energy

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CONTENT

The bill would create the "Communication Act" to do the following:

- Prohibit the Public Service Commission (PSC) from regulating the rates, charges, terms, or conditions for, or entry into or exit from, the provision of any communications service.
- Require a person to register with the PSC, and pay an annual \$100 registration fee, to provide a communications service in Michigan.
- Specify that, in administering the proposed Act, the PSC would be limited to the express powers and duties prescribed by the Act.
- Authorize the PSC to administer all Federal telecommunications laws, rules, orders, and regulations delegated to the State.
- Authorize the PSC to promulgate rules to administer the proposed Act.
- Prohibit a governmental entity from providing a communications service except for the entity's own use.
- Require the PSC, upon receiving an application or complaint, to conduct an investigation, hold hearings, and issue its findings and orders in accordance with the Administrative Procedures Act (APA).
- Allow a complainant to request an emergency relief order, and allow the PSC to grant the order if it found that certain conditions existed.
- Prescribe penalties for a provider that violated the proposed Act.
- Require the PSC to issue orders assigning the telephone digits 2-1-1

to community resource information and referral answering points, and designate an entity to be the 2-1-1 answering point for each geographical area.

- Require the PSC to require each provider to make available a communication relay service and a communications device for each deaf and hearing- or speech-impaired individual, and require the PSC to appoint an advisory board to assist in administering this provision.

The bill would take effect January 1, 2006. It is described below in further detail.

PSC's Authority, Powers, & Duties

The bill would prohibit the PSC from regulating the rates, charges, terms, or conditions for, or entry into or exit from, the provision of any communications service. The bill specifies that the proposed Act would not prevent any person from providing communications services in competition with another person.

("Communications service" would mean a telecommunications service as that term is defined in 47 USC 153 and the implementing orders and regulations of the Federal Communications Commission (FCC). Under 47 USC 153, "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.)

In administering the proposed Act, the PSC would be limited to the express powers and duties prescribed by the Act. Except as otherwise provided by the proposed Act, the PSC would have the jurisdiction and authority to administer all Federal telecommunications laws, rules, orders, and regulations that were delegated to the State. The PSC would have to exercise its jurisdiction and authority consistent with the proposed Act and all Federal telecommunications laws, rules, orders, and regulations.

The Commission could promulgate rules under the APA that were necessary to administer the proposed Act.

Provider Registration

Under the bill, a person could not provide a communications service in Michigan without first registering with the PSC. The registration would have to include the provider's name and the address and telephone number of the provider's principal office. If the provider were not located in this State, the registration would have to include the address and telephone number of the registered office and the name and telephone number of the registered agent authorized to receive service of process in Michigan.

The registration would have to be accompanied by a \$100 registration fee. The registration would be effective immediately upon its filing with the PSC and payment of the fee. It would remain in effect for one year from its effective date. A person could renew a registration for one year by filing a renewal registration with the PSC on a form provided by the PSC, and paying a \$100 renewal fee.

"Communications provider" would mean a person who provides a communications service for compensation. The term would not include a public utility.

Applications & Complaints

Upon receiving an application or a complaint regarding a provision of the proposed Act, the PSC would have to conduct an investigation, hold hearings, and issue its findings and orders in accordance with the contested hearings provisions of the APA. An application or complaint would have to

contain all information, testimony, exhibits, or other documents and information within the person's possession on which the person intended to rely to support the application or complaint.

Applications or complaints that did not meet the bill's requirements would have to be dismissed or suspended pending the filing with the PSC of the required information. If the complainant or applicant required information in the possession of the respondent, not within the complainant's or applicant's possession, the PSC could allow a reasonable opportunity for discovery to allow the complainant or applicant to provide all relevant information, testimony, exhibits, or other documents on which the complainant or applicant intended to rely to support its application or complaint. The burden of proving a case filed under the proposed Act would be with the party filing the application or complaint.

The PSC could administer oaths, certify to all official acts, and compel the attendance of witnesses and the production of papers, books, accounts, documents, and testimony.

The PSC would have to issue a final order within 90 days from the case's initiation date. In a contested case, the PSC would have to issue a final order within 180 days of the initiation date.

If a provider filed a complaint against another provider, the provider of service could not discontinue service during the period of the contested case if the provider receiving the service had posted a surety bond, provided an irrevocable letter of credit, or provided other adequate security in an amount and on a form as determined by the PSC.

The parties to a contested case could agree to use any alternative means that would result in a settlement of the case, including settlement conferences, mediation, and other information dispute resolution methods.

Emergency Relief

If a complaint filed under the bill alleged facts that warranted emergency relief, the complainant could request an emergency relief order. On the date of the filing, the complaint and request for emergency relief

would have to be hand-delivered to the respondent at its principal place of business in this State. The PSC would have to allow five business days for a filing in response to the request for emergency relief. The PSC would have to review the complaint, the request, the response, and all supporting materials, and determine whether to deny the request for emergency relief or to conduct an initial evidentiary hearing. The hearing would have to be conducted within five business days from the date of the notice of hearing, and the PSC would have to issue an order granting or denying the emergency relief request.

An order for emergency relief could require a party to act or refrain from action to protect competition. Any action required by an emergency relief order would have to be technically feasible and economically reasonable, and the respondent would have to be given a reasonable period of time to comply with the order. At the emergency relief hearing, the respondent would have the burden of showing that the order was not technically feasible and not economically reasonable.

If the PSC found that extraordinary circumstances warranted expedited review before the Commission's issuance of a final order, it would have to set a schedule providing for the issuance of a partial final order as to all or part of the issues for which emergency relief was granted within 90 days of the issuance of the emergency relief order.

The PSC could grant an order for emergency relief if it found that all of the following conditions existed:

- The party demonstrated exigent circumstances that warranted emergency relief.
- The party seeking relief likely would succeed on the merits.
- The party would suffer irreparable harm in its ability to serve customers if emergency relief were not granted.
- The order was not adverse to the public interest.

The PSC could require the complainant to post a bond in an amount sufficient to make whole the respondent if the emergency relief order later were found to have been granted erroneously.

An order for emergency relief would have to expire upon the earliest of the following:

- Ninety days after its issuance.
- Issuance of the PSC's partial final order.
- An earlier date set by the PSC, although the PSC could extend the order to a date not later than the date on which the final order in the proceeding was issued.

An order granting or denying emergency relief would be subject to immediate review in the Court of Appeals as a matter of right by the party aggrieved. The Court could stay an order granting emergency relief upon the posting of a bond or other security in an amount and on terms set by the Court. Regardless of whether an appeal was made, the PSC would have to proceed with the case and issue a final order as otherwise required under the bill.

Frivolous Position

If the PSC found that a party's position in a proceeding under the proposed Act was frivolous, it would have to award to the prevailing party the costs, including reasonable attorney fees, against the nonprevailing party.

"Frivolous" would mean that at least one of the following conditions was met:

- The party's primary purpose in initiating the proceeding or asserting the defense was to harass, embarrass, or injure the prevailing party.
- The party had no reasonable basis to believe that the facts underlying that party's legal position were true.
- The party's legal position was devoid of arguable legal merit.

"Prevailing party" would mean a party who won in the proceeding.

Confidentiality of Information

Except under terms of a mandatory protective order, trade secrets and commercial or financial information submitted under the proposed Act would be exempt from the Freedom of Information Act (FOIA). There would be a rebuttable presumption that cost studies, customer usage data, marketing studies, and contracts between providers were trade

secrets or commercial or financial information exempt from FOIA.

If the information were disclosed under a mandatory protective order, it could be included in the PSC's evidentiary record if admissible but would have to remain confidential.

2-1-1 Service

The PSC would have to issue orders that assigned the telephone digits 2-1-1 to community resource information and referral answering points (described below) and prescribe appropriate interconnection orders to carry out the intent of these provisions.

The Commission would have to designate a community resource information and referral entity to be the 2-1-1 answering point for various geographical areas within the State. In making its determination, the PSC would have to consider all of the following:

- The recommendations of the Michigan Alliance for Information and Referral Systems (MI-AIRS).
- Whether the relevant State-endorsed multipurpose collaborative bodies were in agreement.
- Whether the entity had established a framework to assure the provision of coverage of the 2-1-1 telephone number 24 hours per day, seven days per week.
- Whether the entity met 2-1-1 standards adopted by MI-AIRS.

Each designated entity would have to establish the framework to provide sufficient resources to operate the 2-1-1 telephone number 24 hours per day, seven days per week.

Services for the Deaf; Advisory Board

The PSC would have to require each provider to make available a text telephone communications device for the deaf at costs to each individual who was certified as deaf or severely hearing- or speech-impaired by a licensed physician, audiologist, or qualified State agency, and to each primary or secondary public safety answering point (PSAP). (Under the Emergency Telephone Service Enabling Act, a PSAP is a communications facility operated or answered on a 24-hour basis assigned responsibility by a public agency or county

to receive 9-1-1 calls and to dispatch public safety response services.)

The PSC would have to require each provider to make available a communication relay service whereby a person using a text telephone communications device for the deaf could communicate with people using a voice telephone through the use of third-party intervention or automated translation. Each provider would have to determine whether to provide a communication relay service on its own, jointly with other providers, or by contract with other providers. The PSC would have to determine the technical standards and essential features of text telephone and communication relay service to ensure their compatibility and reliability.

The PSC also would have to appoint a three-person advisory board consisting of a representative of deaf individuals, PSC staff, and providers to assist in administering this section of the bill. The board would have to hold meetings open to the public at least once every three months, seek input periodically on the administration of the relevant provisions from individuals who were deaf or hearing- or speech-impaired, and report to the PSC at least annually. The board would have to investigate and make recommendations on the feasibility of hiring a reasonable number of individuals who were deaf or hearing- or speech-impaired to work in the provision of telecommunication relay service.

Rates and charges for calls placed through a communication relay service could not exceed the rates and charges for calls placed directly from the same originating location to the same terminating location. Unless ordered by the PSC, a provider of a communication relay service would not be required to handle calls from public telephones except for calls charged collect, cash, to a credit card, or third-party number.

Attachments

A provider would have to allow and establish the rates, terms, and conditions for attachments by another provider, a cable service, or an educational institution. The rates, terms, and conditions would have to be just and reasonable. A rate would be just and reasonable if it assured the provider

recovery of at least the additional costs of providing the attachments, or more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit activity, that was occupied by the attachment, by the sum of the operating expenses and actual capital costs of the provider attributable to the entire pole, duct, or right-of-way.

(The bill would define "attachment" as any wire, cable, facility, or other apparatus installed upon any pole or in any duct or conduit, owned or controlled, in whole or in part, by a provider. "Usable space" would mean the total distance between the top of a utility pole and the lowest possible attachment point that provided the minimum allowable grade clearance and included the space separating communication and power lines.)

An attaching provider or cable service would have to obtain any necessary authorization before occupying public ways or private rights-of-way with its attachment.

The bill states that these provisions would not limit the PSC's authority to regulate the rates, terms, and conditions of attachments upon poles or inducts or conduits owned or controlled by utilities engaged in the transmission of electricity for light, heat, or power.

End-User Authorization for Switching & Service

The bill provides that an end-user of one provider could not be switched to another provider without the end-user's oral authorization, written confirmation, confirmation through an independent third party, or other verification procedures subject to PSC approval, confirming the end-user's intent to make a switch and that the end-user had approved the details of the switch.

A provider could not include or add optional services in an end-user's telecommunications service package without the end-user's oral authorization, written confirmation, confirmation through an independent third-party, or other verification procedures subject to PSC approval.

The PSC would have to adopt rules to enforce these provisions. The rules would have to require that all providers comply with the regulations established by the FCC on verification procedures for the switching of an end-user's communications provider.

Federal Universal Service Support

The bill would require a provider that received Federal universal service support for telecommunications services provided to eligible elementary and secondary schools or libraries under the Federal Telecommunications Act to provide those intrastate services at discounts equal to the discounts applicable for eligible interstate services.

(Under the Federal Telecommunications Act, upon a bona fide request for any of its services that are within the definition of universal service, a telecommunications carrier serving a geographic area must provide those services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount must be an amount that the FCC, with respect to interstate services, determines is appropriate and necessary to ensure affordable access to and use of the services by schools and libraries. The states must determine the rate with respect to intrastate services. Either an amount equal to the amount of the discount is treated as an offset to a provider's obligation to contribute to the mechanisms to preserve and advance universal service, or the provider must receive reimbursement using the support mechanisms to preserve and advance universal service.)

Prohibited Activities

The bill would prohibit a provider from doing any of the following:

- Making a statement or representation, including the omission of material information, regarding the rates, terms, or conditions or providing telecommunication service that was false, misleading, or deceptive.
- If an end-user had canceled the service, charging the end-user for service provided after the effective date the service was canceled.

- If a residential end-user had ordered a service orally, failing to confirm the order in writing within 15 days.
- Disparaging the services, business, or reputation of another by false or misleading representation of fact.
- Representing to a party to whom services were supplied that the services were being supplied in response to a request made by or on behalf of the party when they are not.
- Causing a probability of confusion or a misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction.
- Representing or implying that the subject of a transaction would be provided promptly, or at a specified time, or within a reasonable time, if the provider knew or had reason to know it would not.
- Causing coercion and duress as a result of the time and nature of a sales presentation.
- Charging an end-user for a subscribed service for which the end-user did not make an initial affirmative order.

The bill specifies that failure to refuse an offered or proposed subscribed service would not be an affirmative order for the service.

The PSC could accept an assurance of discontinuance of a method, act, or practice that was alleged to be unlawful under any of these provisions from the person who was alleged to have engaged, be engaging, or be about to engage in the method, act, or practice. The assurance would not be an admission of violation of the proposed Act and could not be introduced in any other proceeding. Unless rescinded by the parties or voided by the court for good cause, the assurance could be enforced in the circuit court by the parties to it. The assurance could include a stipulation for any of the following:

- The person's voluntary payment for the cost of investigation.
- An amount to be held in escrow pending the outcome of an action.
- An amount for restitution to an aggrieved person.

The bill also would prohibit a provider from refusing, charging, delaying, or impairing

the speed of connection of a person to a communications emergency service.

Violations, Remedies, & Penalties

If after notice and hearing as prescribed in the bill the PSC found that person had violated the proposed Act or rules promulgated under it, the PSC would have to order remedies and penalties where applicable as follows:

- Order the person to pay a fine of between \$1,000 and \$20,000 for the first violation and a fine of between \$2,000 and \$40,000 for a subsequent violation; or, if the person had fewer than 250,000 access lines, order the provider to pay a fine of between \$200 and \$500 for the first violation and between \$500 and \$1,000 for a subsequent violation.
- Order the revocation of the person's registration.
- Order the person to cease and desist.

If after notice and hearing the PSC found that a person had violated Section 12 (unauthorized switching or service), Section 13 (universal service support), Section 14 (prohibited activities, except delaying emergency service), or Section 15 (delaying emergency service), or rules promulgated under those sections, the Commission could order remedies and penalties to protect and make whole end-users and other persons who had suffered damages as a result of the violation.

For a first violation, the PSC could order the person to pay a fine of between \$20,000 and \$30,000. For a second or subsequent violation, the PSC could order the person to pay a fine of between \$30,000 and \$50,000. If the PSC found that a second or subsequent violation of Section 13, 14, or 15 was made knowingly, it could order a person to pay a maximum fine of \$70,000. Each switch made or service added in violation of Section 12 or 14 would be a separate violation.

Additionally, the PSC could do the following:

- Order an unauthorized provider to refund to the end-user any amount greater than the end-user would have paid to an authorized provider.

- Order that between 10% and 15% of the fine be paid directly to the customer who suffered the violation of Section 12 or 14.
- Order an unauthorized provider to reimburse an authorized provider an amount equal to the amount paid by the end-user that should have been paid to the authorized provider.
- Revoke the registration if the PSC found a pattern of violations of Section 12 or 14.
- Issue cease and desist orders.

The bill specifies that the PSC would not have authority to award compensatory damages for any violation of the proposed Act, beyond the damages described above.

A fine could not be imposed for a violation of Section 12 if the provider had otherwise fully complied with that section and showed that the violation was an unintentional and bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error. Examples of a bona fide error would include clerical, calculation, computer malfunction, programming, or printing errors. An error in legal judgment with respect to a person's obligations under that section would not be a bona fide error. The burden of proving that a violation was an unintentional and bona fide error would be on the provider.

Other Provisions

The PSC would have to provide for the electronic filing of pleadings and other documents. The electronic filing of materials would be effective upon submission of the materials to the PSC.

In addition to any other relief provided by the proposed Act, the PSC or a party could seek to compel compliance with a Commission order by proceedings in mandamus or injunction, or by other appropriate civil remedies in the circuit court or other court of proper jurisdiction.

Providers of a regulated service in this State would have to pay assessments in an amount equal to the PSC's expenses under Public Act 299 of 1972, which provides for the assessment, collection, and disposition of the costs of regulating public utilities. (Under the bill, "regulated services" would mean a wholesale service over which the PSC had authority under the proposed Act.)

FISCAL IMPACT

The bill in effect would replace the current Michigan Telecommunications Act, which sunsets on December 31, 2005. The Public Service Commission would have fewer regulatory responsibilities under the bill; however, it would retain responsibility for certain consumer protection activities. The operational expenses of the PSC that are funded by assessments on regulated entities could be reduced by an unknown amount. The bill also would reduce the amount of fines that may be assessed for violations, which would reduce the amount of penalty revenue transferred to the General Fund.

The bill would prohibit governmental entities from offering to the public telecommunications services as defined in the bill. Currently, the Coldwater Board of Public Utilities (CBPU) holds a license from the Public Service Commission to operate local telephone service, but it has not yet offered that service. The bill would prevent Coldwater from offering local phone service under that license, limiting its future revenue and expenditures by an unknown amount. The CBPU currently offers long distance and voice over internet telephone service. There is uncertainty regarding the impact of Federal implementing decisions on the proposed definition of "communications service"; however, it appears that the provision by governmental entities of long distance and voice over internet telephone service could be prohibited by the bill.

Based on the definition of "communications service" in the bill, it does not appear that the bill would impair a governmental entity's ability to offer cable television and broadband service.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.